Brief of Knaebel for Appt.

IN THE

SUPREME COURT

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OF THE UNITED STATES.

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OCTOBER TERM, 1896.

No. 186.

MARTIN B. HAYES,
Appellant,

vs.

THE UNITED STATES,
Appellee.

Appeal from the Court of Private Land Claims.

STATEMENT AND ARGUMENT OF APPELLANT.

JNO. H. KNAEBEL,
Counsel for Appellant.

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ARGUMENT OF JOHN H. KNAEBEL, Counsel for the Appellant.

Statement.

The Court of Private Land Claims, sitting at Santa Fé, New Mexico, by its decree, dated the fourth of December, 1893, rejected the private land claim known as the Antonio Chaves grant, as well as by other appellations. (*Transcript*, fol. 218.) The land affected is situate in the county of Socorro, New Mexico. From that decree, the claimant, Martin B. Hayes, has appealed to this court.

The petition to the Land Court for the confirmation of the grant was filed on the twenty-fourth of September, 1892, and, while it correctly sets out by the exhibits which accompany the petition and are made part thereof (*Ib.*, fols. 4, 5, 13, etc.) the original muniments of title as found in the archives pertaining to the provincial government of New Mexico, it contains some historical errors, through the inadvertence of its draftsman, who was misled by similar inadvertence on the part of the surveyor-general appearing in his favorable report. (*Ib.*, fol. 29.) For instance, the grant is referred to, both in that report *(supra)* and the petition (*Ib.*, fol. 2, etc.), as well as on the trial, as having been made by the governor and departmental assembly of New Mexico; whereas, territorial governors and departmental assemblies were not established until after the pretended and usurpatory amendment of the constitution of 1824 by the "constitutional bases" of the third of November, 1835, establishing the "central" government (4 "Mexico," *infra*, 355, 357), and the grant was in fact made, as sufficiently appears from the exhibited archives (*Ib.*, fols. 13 to 24, and fol. 48), by the provincial (or "territorial") deputation of New Mexico, with the concurrence of the political chief.

The Land Court unanimously found our title to be one characterized by good faith and that "the expediente of title is regular in form and purports to convey an estate in fee," but three of the justices were of the opinion that it is invalid, because emanating from the provincial deputation and political chief, and the assent of the supreme executive of Mexico was not shown to their satisfaction, while two of the justices (FULLER and STONE, J. J.) were of opinion that the title is meritorious and ought to be confirmed. (*Ib.*, fol. 216.)

In the opinion (*Ib.*, fol. 208 *et seq.*), the court very fairly summarizes the facts as follows:

> "The expediente of title shows that on the third day of March, 1825, one Antonio Chaves, a Mexican citizen, presented his petition to the provincial deputation of the province of New Mexico, asking for a grant to a large tract of land for the purposes of pasturage, etc. The boundaries called for in the petition include something over 20,000 acres of land which had been previously granted by the Spanish government to the towns of Sevilleta and Socorro. The petition was referred by the provincial deputation to the *(jefe político)* political chief, to ascertain and report whether or not the land included in the calls set out in the petition which had been previously granted to said towns should be granted to the petitioner. The political chief, in an elaborate report, recommended (for various reasons assigned) that all the land asked for in the petition be granted to Chaves. The report was adopted, and one Juan Francisco Baca, an alcalde, directed to put the petitioner in juridical possession of the land prayed for. The secretary of the deputation was directed to give said Chaves a certificate of title. He was duly put in possession on the twentieth day of April, 1825, and he and those claiming under him have been in possession of [the land] ever since. The petitioner claims under mesne conveyances from the original grantee. The tract of land granted contains about 131,000 acres. The various papers constituting the expediente of title are regular in form, and were properly recorded in the archives of said provincial deputation. The entire proceedings seem to be free from fraud, in fact, and if the provincial deputation, with the concurrence of the political chief, had power to make the grant, it should be confirmed in part, if not in full,

> and to test that question the court must look to the laws in force in the province of New Mexico at the date of the grant. It will be observed that the grant was made about six months subsequent to the enactment by the congress of Mexico of the colonization law of the eighteenth of August, 1824, and more than three years prior to the promulgation of the regulations of November 21, 1828."

Then, with very superficial examination, and with especial reliance on the *dictum* of Mr. Justice NELSON, in the Vallejo case (discussed in our FOURTH POINT, *infra*), the opinion (*Transcript*, fol. 210) rejects the law or royal order under the decree of the Spanish cortes of the fourth of January, 1813, and assumes that the royal cedula of the fifteenth of October, 1754 (*Vide United States vs. Clarke*, 8 Pet., at page 452) was repealed by the resolution of the Council of the Indies of the twenty-third of December, 1818, although that resolution contained no repealing words (*Hall's Mexican Law*, § 188 *note*, and § 85), and there is not the slightest evidence, or other reason to believe, that such resolution was ever promulgated in New Mexico—the epoch being one in which New Spain was in a turbulent revolution. Thereupon the opinion proceeds to discuss the colonization law of the eighteenth of August, 1824 (*Transcript*, fol. 210), and, without adverting to the non-promulgation of that law in New Mexico, or to its arbitrary and vicious origin (discussed in our FOURTH POINT, *infra*), holds that, prior to the regulations of 1828, it could not operate to confer any authority on the executive and legislative government of that jurisdiction, unless by the intervention, express or implied, of the supreme executive of Mexico. (*Ib.*, fol. 211.) The court, however, in

considering the proposition of counsel, contained in the petition for a rehearing (*Ib.*, fol. 220), that it was the duty of the court, if the colonization law was relevant, to assume that the action of the provincial deputation and political chief had the sanction of the supreme executive, said (*Ib.*, fol. 211):

> "If the petition, grant and other proceedings on the part of the provincial deputation and political chief had shown an intention to carry out the general policy of the colonization law of 1824, the contention of counsel would be entitled to great weight. But, on the contrary, the records show that neither the petitioner nor any one else connected with the entire transaction had any idea whatever of complying with the provisions of that law."

The reasoning of the court on this subject is, we believe, sufficiently answered in our FIRST POINT *(infra.)*

The court, alluding to our presentation of the political equities attending the title, erroneously assumed that they were not cognizable by the court under the statute providing for its establishment, and further said (*Ib.*, fol. 213):

> "If this cause was pending before Congress, the position assumed by counsel might be entitled to favorable consideration."
>
> *(Vide* THIRD POINT, *infra.)*

Assigning as error the decision of the Land Court rejecting the grant and failing to confirm it as a complete and perfect title, we submit the following grounds upon which we seek a review:

(a) Our title is complete and perfect, because it was competent for the provincial deputation, and

especially for that body and the political chief, to grant it under the laws, usages and customs recognized and operative in New Mexico at its date, and because it is fortified by the law of presumption and the law of prescription.

(*Vide* FOURTH POINT, *infra.*)

(*b*) The portions of our grant which were carved out of the towns of Socorro and Sevilleta were unquestionably under the granting authority of the provincial deputation; and its action, prompted by the political chief and carried into effect by the proper alcalde, conferred a perfect title, which is strengthened by the law of presumption and the law of prescription.

(*Vide* SECOND POINT, *infra.*)

(*c*) While we show, in our FOURTH POINT, *infra*, that the colonization law of 1824 was not in force, or even promulgated, in New Mexico at the date of our grant, still, on the assumption that it was applicable, it was the duty of the Land Court to invoke, in aid of the title, the presumption that the grant received the express or acquiescent sanction of the federal government, and also that it received, after the promulgation of the regulations of 1828, the express or acquiescent sanction and re-approval of the political chief and provincial ("territorial") deputation, consistently with those regulations.

(*Vide* FIRST POINT, *infra.*)

(*d*) The equities which attach to the grant, under the treaty, the law of nations, the laws, usages and customs of Spain and Mexico, and the principles of public law, demand its confirmation.

(*Vide* THIRD POINT, *infra.*)

The court will notice, from the proceedings on the trial, that several months after the provisional submission of the case (*Transcript*, fol. 49), the government was permitted to offer evidence tending to show that "Ojo de la Jara" or Willow Spring, named as the westerly boundary call, is not the "Ojo de la Jara" shown on the United States provisional survey and identified by our proofs—being the spring near "La Jara Peak" laid down on the government map of New Mexico—but that it is a small spring commonly known as "Ojo Ariveche," lying to the east of our valuable pasture lands.

To maintain this afterthought respecting our western boundary, the government introduced several witnesses, namely, José Antonio Baca (*Ib.*, fol. 49), Cayetano Tafoya (*Ib.*, fol. 60), L. M. Brown (*Ib.*, fol. 67), Melquiades Luna (*Ib.*, fol. 101), Ethan W. Eaton (*Ib.*, fol. 113), and Luciano Chaves (*Ib.*, fol. 115), and, in connection with their testimony, the government put in evidence a sketch of the official survey of the grant, with the addition (for the purpose of identification) of the words "Ojo de la Jara" at the point where the "Ojo Ariveche" is supposed to be. (*Transcript*, fol. 205.) A sketch of the government plat, introduced by the claimant, appears *Ib.*, fol. 31. (*Ib.*, fol. 158; also Ex. No. 5, fol. 180.)

These witnesses were produced in person and testified orally, so that the learned justices had abundant opportunify to observe their personal appearance and intelligence, or lack of intelligence, as well as to note their demeanor on the stand and any suspicious features in their testimony; and also to compare them in these particulars and others with the witnesses and testimony produced by the claimant in support of the government survey and in the identification and location of the Ojo de la Jara intended

by the title papers. Our witnesses on this subject were Pablo Padilla (*Ib.*, fol. 120), Nepomuceno Aragon (*Ib.*, fol. 128), Pablo Sanchez (*Ib.*, fol. 138), Jesus Baca, the "*caporal*" or chief shepherd of Antonio Chaves, the grantee (*Ib.*, fol. 149), and Martin B. Hayes (*Ib.*, fol. 158). In addition, we introduced the very important deposition of Hon. Hiram G. Bond (*Ib.*, fol. 89).

A perusal and comparative criticism of all the evidence relating to the situation of the "Ojo de la Jara" mentioned in the granting papers will convince any impartial mind that the Land Court was right in finding, as matter of fact, that this western boundary call is the same spring, situate near "La Jara Peak," at which the surveyor-general established our northwestern corner. That the Land Court was of opinion that the spring intended was the one so located by the survey is evident from its finding that "the tract of land granted contains about 131,000 acres" (*Ib.*, fol. 209), and from its further declaration (*Ib.*, fol. 211) that "the grant is for more than twice the quantity of land grantable under the law"; that is, more than twenty-two square leagues.

Indeed, there are circumstances of grave suspicion attending the effort of certain witnesses to deprive us of our pastures by pretending that the prominent "Ojo de la Jara" in the contemplation of the grantee, in asking for the grant, and of the official authorities, in making it, was the insignificant water drip called the "Ojo Ariveche" (*Ib.*, fols. 137, 152); the success of which pretension would be to confine us substantially to arid, worthless lands lying east of the "Ojo Ariveche" (*Ib.*, fol. 169).

During the delays to which private land claimants in New Mexico have been subjected, in the assertion of their rights under the treaty, much cupidity has been excited in unscrupulous squatters,

covetous of waters, pastures, woods and fancied mines, and in consequence dangerous adversaries have arisen, who, under pretense of aiding the government to extend the public domain, cherish the intention to appropriate to themselves the property from which, by their aid, the old Mexican inhabitants or their assigns may be excluded. We feel persuaded that, in making its effort to identify the "Ojo Ariveche" with the "Ojo de la Jara," the government has been misled by evil disposed or unscrupulous persons. The court will notice that when Judge Bond, Mr. Charles D. Arms and Mr. Latham L. Higgins were examining the property and investigating its title, with a view to take from the Mexican owners a conveyance under a title bond or contract which the latter had given to the claimant Hayes (*Ib.*, fols. 92, 95), Judge Bond employed the surveyor L. M. Brown to make a survey and topographical map of the grant (*Ib.*, fols. 67, 71, 172), and at that time Brown neither knew nor pretended to know anything against the correctness of the location of the "Ojo de la Jara" on the government survey. (*Ib.*, fols. 71, 72.) The United States field notes show (*Ib.*, page 97) that on the south boundary course of the grant the surveyor ran west, on the twenty-sixth mile, "to a point determined by a blank line to be due south of the east edge of the Jara spring, the western boundary call of the grant, *which is a universally known point*, and is also identified in the evidence herewith submitted." If Mr. Brown had been a man of just and equitable nature, he would naturally have informed Judge Bond and his associates, by whom he had been paid for his work, of any subsequent information tending to show that both the government survey and his own were incorrect as to the northwestern boundary call. After eight years (*Ib.*, fol. 71), during which period

neither he nor anybody else raised any question about the integrity of the location of the northwestern corner, although the survey is indicated on the land office plats and the published government map, and after the trial of this cause had been concluded provisionally for several months, without any objection on this point (*Ib.*, fol. 49), Brown appears as a government special agent "looking up testimony in this case" (*Ib.*, fols. 67, 174), and bestirs himself to find witnesses to prove that, although the "Ojo Ariveche" had been known by that name for nearly fifty years last past, it had in earlier days been called "Ojo de la Jara" or "La Jarita."

The work of Mr. Brown began to appear on the hearing which (after a delay since the thirteenth of December, 1892) took place on the sixteenth of March, 1893. (*Ib.*, fol. 49.) The government then called José Antonio Baca, who testified that before 1848 or thereabouts the Ariveche spring was called La Jara spring, "because there was a great quantity of willow trees there." (*Ib.*, fol. 51.) He added on his direct examination (*Ib.*, fol. 33) that he thought the people who "soldiered" never went west of the mountains, "because the Indians would kill them there;" but, on cross-examination (*Ib.*, fols. 56, 57), he said that he and many others, when he was twenty-five years old, often went to the La Jara spring that is near the Bear mountains "for the Indians." On re-direct, however, he contradicted this statement. (*Ib.*, fol. 58.) Again, on re-cross, he said that it was at La Xinsa spring that a man named Ariveche had been killed. (*Ib.*, fol. 58.) This also he afterwards contradicted. (*Ib.*, fol. 58.) He had nothing "in those days to do with those springs or that country about," except that he went on expeditions. (*Ib.*) This witness, riding in a buggy with the witness Brown, had approached

our witness Pablo Sanchez in a significant way about his knowledge of the springs, etc., and it seems that Cayetano Tafoya also had had a like conversation. (*Ib.*, fols. 144, 145, 146, 174.)

The witness Cayetano Tafoya gave the same kind of hearsay testimony, and he referred to the Ariveche spring as being in the "Cañon del Ojo de la Jara," although there is no "cañon" there, but only a small cañada. (*Ib.*, fol. 61.)

The witness Brown was examined for the government, and then it rested on the sixteenth of March, 1893, and, on a suggestion of surprise, the claimant was permitted to introduce evidence in rebuttal at the next term, at which he produced his testimony on the twenty-third of November, 1893 (*Ib.*, fol. 100). Judge Bond, in his deposition, shows how careful he was in the investigation of the boundary calls at the time when, on the very ground, he was bargaining with one of the owners, Anastacio Garcia, then in actual occupation, for its purchase (*Ib.*, fol. 89). The old Mexican, Garcia, then and there pointed out the Ojo de la Jara, at the northwestern corner of the grant (*Ib.*, fol. 91), and, upon Judge Bond's inquiry, declared that there was no other spring of that name, although when an effort was made to obtain a resurvey, some parties had vainly sought to have it extended to a spring west of the Ojo de la Jara located by the government. (*Ib.*, fol. 93.) It is likely that this suggestion as to a La Jara spring to the west of the true northwestern corner inspired the later suggestion to the disparagement of that correct location. Judge Bond found confirmation in the speech of other old neighbors—among them one Abeytia and one Baca—of the declaration of Garcia regarding the location of La Jara spring. (*Ib.*, fol. 94.) Judge Bond also testified (*Ib.*, fol. 94): "I have on three several occasions visited different parts

of the grant and talked with people living near, and some of them who were living temporarily upon it, and I never heard mentioned the name of any spring called La Jara spring other than the one first indicated by me. Names were given to every spring upon the property, but none of them except the one at the northwest corner of the property was ever called La Jara."

In these circumstances, Anastacio Garcia, being dead at the date of this deposition, his declarations on the ground were competent evidence.

Hunnicutt vs. Peyton, 102 U. S. 333.

On the resumption of the trial at the November term, A. D. 1893, the government, apparently in view of Judge Bond's important deposition, which had been returned in vacation and filed October 26, 1893 (*Ib.*, fol. 96), produced the witnesses Melquiades Luna (*Ib.*, fol. 101), Ethan W. Eaton (*Ib.*, fol. 113), and Luciano Chaves (*Ib.*, fol. 101), for the purpose, among other things, of showing other declarations by Anastacio Garcia, which, however, if they were ever made, seem incompetent according to the rule definitely announced in *Hunnicutt vs. Peyton, (supra)*.

The witness Melquiades Luna was one of the heirs of Rafael Luna (*Ib.*, fol. 101), a former co-tenant of the grant, and, having sold out, seemed interested in curtailing it, lest it might be prejudicial to a "ranch" on which he had squatted or otherwise temporarily settled. (*Ib.*, fols. 101, 106.) He testified that he had been over the grant "a little" (*Ib.*, fol. 101), and "had heard" the Ariveche called "La Jara" by "several of the old fellows," but had never heard his own father say anything on that subject or on that of the boundaries. (*Ib.*, fol. 102.) To a leading question he answered,

over objection, that in 1883 he had heard Anastacio Garcia say that "the Ariveche was the west line of the grant." Such declarations, if they were ever made, seem not to be admissible under the doctrine of *Hunnicutt vs. Peyton*, 102 U. S. 333, because they were not connected with any pointing out of boundaries or other duty on the part of Garcia. The witness was very indefinite as to the alleged conversation and, besides, he had evidently been "looked up" by Brown. (*Ib.*, fol. 107, *et seq.*) He was also seeking to impeach a title which he had conveyed. (*Ib.*, folio 105.) His description of the Ojo Ariveche is so obscure and uncertain that he makes it apparent that that spring could never have been selected in 1825 as a controlling land mark. (*Ib.*, fols. 110, 111.) He said, "I can't describe it very well, as I just passed by."

The testimony of Ethan W. Eaton (*Ib.*, fol. 113) is all hearsay and incompetent, under the rule to which we have referred, and it is evident that the general conversation in a country store which the witness mentioned related to the same subject discussed between Garcia and Judge Bond, namely, the suggestion made, when a further survey was sought, that the northwestern corner should be extended westerly from the Ojo de la Jara located by the government. (*Ib.*, fols. 92, 93.)

The testimony of Luciano Chaves (*Ib.*, fol. 115) is very incompetent and even open to suspicion. He was the justice of the peace who took the depositions of Romualdo Chaves and Francisco Chaves y Marquez, on the fourth of October, 1877 (*Ib.*, fols. 116, 119; exhibits 3 and 4, fols. 178, 179). He undertakes to give some general gossip, and represent Romualdo Chaves as saying that his father had told him that the Ojo Ariveche was the Ojo de la Jara given in the grant as a boundary. (*Ib.*,

fols. 116, 117.) He did not pretend that either Anastacio Garcia or Mr. Hayes heard this gossip. On the contrary, having given the last of the pretended statement of Romualdo Chaves, the witness proceeded to say (*Ib.*, fol. 117): "At this time Don Anastacio Garcia came into the room where we were and heard the conversation and said to Don Romualdo Chaves, 'Shut up your mouth,' and Mr. Chaves did so." The testimony of Mr. Hayes that he never heard even a suggestion that the Ariveche was the western boundary bears the impress of truth. (*Ib.*, fols. 159, 160, 168.)

It is significant that the justice of the peace Luciano Chaves, on the very day of this pretended gossip, had sworn Romualdo Chaves as a witness and in his own handwriting (*Ib.*, fol. 119) had, after propounding to that witness the question (*Ib.*, fol. 178): "Do you know the location of the Jara spring, which forms the west boundary call of said grant, and if so, where is it situated?" written his answer as follows (*Ib.*, fol. 178): "Jara spring is west from the Rio Grande about thirty miles, more or less," and had, after propounding to the same witness the question *(Ib.)*: "How do you know the location of these natural objects?" written his answer as follows *(Ib.)*: "From a personal knowledge and general reputation since I can remember."

On the other hand, the testimony which supports the government location, by its survey, of the Ojo de la Jara intended in the grant is clear, convincing and overwhelming.

When Luciano Chaves was recalled, he testified that he had heard the Ariveche called "La Jarita" (*Ib.*, fol. 176); also, that as to the appellation Ariveche, "some call it the Cañada Ariveche and some call it the spring of Ariveche, and that is the difference between us." (*Ib.*, fol. 177.)

It is to be observed that "La Jarita" is a diminutive of "La Jara," and that a spring prominent enough in 1825 to be selected as an important land mark would hardly change its name "Ojo de la Jara" to a mere diminutive, and that "Ojo de la Jara" would never give way in the popular mind to "Cañada de Ariveche." Old landmarks are not subject to such variations of nomenclature among Spanish or Mexican peasants.

The witness Pablo Padilla, fifty-seven years old, understood from boyhood that the Antonio Chaves grant extended to Ojo de la Jara, west of Bear mountain and in the Arroyo de la Jara, and he testified that there were many willows there (*Ib.*, fols. 121, 122, 126). He knew nothing of the Ariveche spring, nor of any willows in or about that cañada—there being only a growth there of palo blanco and sabinal. (*Ib.*, fol. 123.) The witness Nepomuceno Aragon, the uncle of Luciano Chaves, testified (*Ib.*, fol. 129) that it was declared by Anastacio Garcia and the people generally that the grant extended to Ojo de la Jara, northwest of Bear mountain; also that in 1862 "there were a great many willows growing there;" that since 1857 he had known the Cañada Ariveche and the small spring there; that it was the cañada and not the spring that was called Ariveche; that, while plenty of "palo blanco" grew there, no willows did; that in that spring "the quantity of water was very small; to get a drink [one] had to dig with a stick" (*Ib.*, fol. 132); that in its natural condition the spring was useless for watering cattle or sheep (*Ib.*, fol. 137); and that the Navajos made their exits by way of Ojo de la Jara. (*Ib.*, fol. 137.)

The witness Pablo Sanchez, fifty-five years old, identified the Ojo de la Jara, as well as the Arroyo de la Jara and La Jara Peak (*Ib.*, fol. 139), and

described the extraordinary growth of willows at Ojo de la Jara, as the same used to appear. He testified that he knew the Cañada Ariveche in 1854 or 1855; that then the spring there had no name—only the cañada; that the quantity of water was very small, although it might sometimes be sufficient to keep one donkey (*Ib.*, fol. 141); that there were no willows at all there, only palo blanco and lemito; that he had never heard that either the cañada or the spring ever had any name except "Ariveche." (*Ib.*, fols. 142, 143.) The witnesses José Antonio Baca and Cayetano Tafoya seem to have struggled in vain to "refresh" the memory of this witness. (*Ib.*, fols. 144, 145, 146.) The testimony of the witness Jesus Baca (*Ib.*, fol. 149) ought to be conclusive of this question. He was the "caporal," or chief shepherd, of the original grantee, who, as his master, pointed out to him the boundaries of the grant, in order to assist Baca and the other servants in keeping the estate clear from trespassers. It is believed that the testimony of this witness convinced the Land Court of the correctness of the location of Ojo de la Jara by the government survey, and of the falsity of the new-sprung theory of the metamorphosis of Ojo de la Jara into Ojo Ariveche. The old man showed that the latter spring was in the time of Antonio Chaves a mere water drip, never known as Ojo de la Jara, and was named by him and the other shepherd boys "the Chupadero," because "the quantity of water taken from it was very small, and was only sufficient to be taken and put in barrels, and not sufficient to water the burros." (*Ib.*, fol. 132.) He said (*Ib.*, fol. 155): "It was a water can; they called it Chupadero. In those times it did not have the name of Ariveche. We gave it that name—*I myself.*" As to the pretended growth of willows in the Cañada Ariveche, this witness said: "There

never have been any; neither will there be any while there is a world. * * * The willows could not grow there in those times when it would rain, much less grow there now when it is so dry." (*Ib.*, fols. 153, 157.)

Mr. Hayes also testified that there were no willows visible about Cañada Ariveche (*Ib.*, fol. 164), while at Ojo de la Jara the growth of willows is "quite marked" (*Ib.*, fol. 161), and the spring is a good one.

Doubtless some witnesses in referring to the bushes growing in and about the Cañada Ariveche, may have assumed them to be willows because of the generally similar appearance of the foliage.

There stand out certain plain facts which sustain the contention that the true Ojo de la Jara is the spring which forms the northwestern corner of the government survey:

First. The fact established by human experience that an old appellation of a land mark adopted for generations in popular usage does not pass away suddenly or give place readily to a substituted appellation, especially in an ignorant, simple-minded community.

Second. Antonio Chaves was an important citizen of the province, who, at a time when land had little value, might properly ask and confidently expect a large donation of pastures, etc. The land lying east of the Cañada Ariveche is almost worthless, except a small tract on the river which might possibly be irrigable after a serious expenditure. (*Ib.*, fol. 169.) The only valuable pasturage lies west of that cañada. (*Ib.*) In asking for the grant, Antonio Chaves (*Ib.*, fol. 19) laid stress on his need of pasture grounds. Moreover, conscious of his influence and ability, he suggested that from the proposed grant there "will result to the province

in general a great assistance and relief, inasmuch as at this point will be frustrated and prevented the incursions, ambushes and assaults of the enemies of our quietude and peace, who often invade and attack."

The political chief, after a conscientious consideration of the application, made a most favorable report thereon (*Ib.*, fols. 20, 21), and, treating the grant as so serious in its result as to be a means of bringing prosperity to the neighborhood, and especially strong protection against the savages, he said:

> "The first and important [reason] is the increase of the population to such a degree that it will afford means to the said settlements of Socorro and Sebilleta by *guarding a portion of the entrances and exits of the savages* who, though at peace, come to rob, as those at war endeavor to harass the same settlements, or those surrounding or near them."

[In the original, *Ib.*, fol. 15: "Tanto para *cubrir* una parte de las entradas y salidas de los barbaros," etc.]

The "entrances and exits of the savages" were at one point the vicinity of Ojo de la Jara, northwest of Bear mountain, and at another the country near the southwestern corner of the grant, towards Pueblo Springs and Magdalena. When the witness Cayetano Tafoya was asked whether there "were passes and places of ingress and egress by which the savages and Navajos came over to the Rio Grande," he answered, "There were at the Puerta de Magdelena and the Carrizo" (*Ib.*, fol. 63), and he added (*Ib.*, fol. 64) that those places were "in the Magdalena mountains." (*Vide* also *Ib.*, fols. 126, 136, 153.)

The witness Nepomuceno Aragon testified (*Ib.*, fol. 137) that the Navajos, when making their incursions, went out "by way of the Ojo de la Jara."

Finally, our evidence as to the location of our northwestern boundary call, the Ojo de la Jara, near Bear mountain, involves overwhelming proof of consistent common reputation as to the boundaries and of declarations by parties in interest, now deceased, made while pointing out the boundary calls.

Beard's Lessee vs. Talbot, Cooke (Tenn.) 142.

Conn vs. Penn, 1 Pet. C. C., p. 511.

Ellicott vs. Pearl, 10 Pet. 412.

Hunnicutt vs. Peyton, 102 U. S. 333, 362.

Clement vs. Packer, 125 U. S. 309.

Ayers vs. Watson, 137 U. S. 584, 596.

Besides, the land has been practically located by the parties in interest and by common consent, as well as by two official surveys of the government made, not by the procurement of the claimant, but *in adversum*, and in the face of the claimant's protest. (*Transcript*, fols. 159, 166, 167, 168.)

Devlin on Deeds, § 1012.

Rhode Island vs. Massachusetts, 4 How. 591, 639.

Lovejoy vs. Lovett, 124 Mass. 270.

FIRST POINT.

ASSUMING, FOR THE SAKE OF ARGUMENT ONLY, THAT THE COLONIZATION LAW OF 1824 WAS IN FORCE IN NEW MEXICO AT THE DATE OF THE GRANT IN QUESTION (MARCH 3, 1825), AND FURNISHED THE PRINCIPLES BY WHICH THE TITLE IS TO BE TESTED, STILL THE GRANT IS ENTITLED TO CONFIRMATION UNDER THAT LAW, AT LEAST TO THE EXTENT OF ELEVEN SQUARE LEAGUES (MEXICAN), OVER AND ABOVE THE PORTION CARVED OUT OF THE TOWN LANDS OF SOCORRO AND SEVILLETA.

It must be remembered that, since no executive "regulations" on the subject of grants in the territories were formulated until 1828, the case does not come within the limitations of any settled mode of procedure and must depend for its interpretation on more general considerations than those invoked for the construction of territorial grants made after 1828.

The first case wherein this court entered into an elaborate examination of a Mexican title claimed under the colonization law of 1824 is that of *Fremont vs. The United States*, 17 How. 542. In opening the opinion of the court, the chief justice said:

> "The court have considered this case with much attention. It is not only important to the claimant and the public, but it is understood that many claims to land in California depend upon the same principles, and will, in effect, be decided by the judgment of the court in this case."

The opinion also contains (page 557) the following important observation, viz:

> "It is proper to remark that the laws of these territories under which titles were claimed were never treated by the court as

foreign laws to be decided as a question of fact. It was always held that the court was bound judicially to notice them, as much so as the laws of a state of the Union. In doing so, however, it was undoubtedly often necessary to inquire into official *customs* and *forms* and *usages*. They constitute what may be called the common or *unwritten* law of every civilized country. And when there are no published reports of judicial decisions which show the *received construction of a statute*, and the powers exercised under it by the tribunals or officers of the government, it is often necessary to seek information from other authentic sources, such as the *records* of *official acts* and the *practice* of the *different tribunals* and *public authorities*. And it may sometimes be necessary to seek information from individuals whose official position or pursuits have given them opportunities of acquiring knowledge. But it has always been held that it is for the court to decide what weight is to be given to information obtained from any of these sources. It exercises the same discretion and power, in this respect, which it exercises when it refers to the different reported decisions of state courts, and compares them together, in order to make up an opinion as to the *unwritten law* of the state, or the *construction given to one of its statutes*. With these principles, which have been adjudicated by this court, to guide us, we proceed to examine the validity of the grant to Alvarado, which is now in controversy."

We add one other excerpt from this important opinion (page 561), viz:

"The chief object of these grants was to colonize and settle the vacant lands. The grants were usually made for that purpose, without any other consideration, and without any claim of the grantee on the bounty

> or justice of the government. But the public had no interest in forfeiting them even in these cases, unless some other person desired and was ready to occupy them, and thus carry out the policy of extending its settlements. They [the conditions] seem to have been intended to stimulate the grantee to prompt action in settling and colonizing the land by making it open to appropriation by others, in case of his failure to perform them."

After this leading case, numerous others affecting titles originating under Mexican grants, made subsequently to the "regulations of 1828," were brought to the attention of the court, but not a single case has been considered so far as we can discover which relates to any provincial or territorial title granted in the interim between the enactment of the colonization law in 1824 and the promulgation of the regulations of 1828. It was only with reference to grants of land in the territories made after the date of the regulations of 1828 that the court used expressions, now frequently quoted, declaring or intimating that the statutory and regulative provisions for Mexican colonization, being written and express, must be deemed exclusive of all contrary presumptions. Hence, with reference to grants in the territories made after the promulgation of the regulations of 1828, the court saw no occasion to indulge any mere presumption that the supreme executive of the republic, under whose authority the regulations were extant as binding directions to the political chiefs, governors, territorial deputations and departmental assemblies, had exercised any discretion in disregard of those regulations, when it appeared that an alleged grant was in violation of their express terms. Nevertheless, the court has always conceded that, notwithstanding the promulgation of the regulations,

the supreme executive retained a continuing power to suspend their operation in a special case, or to abrogate them altogether.

In *United States vs. Osio*, 23 How., at page 283, the court said with reference to a certain dispatch from the supreme executive to the governor of California purporting to authorize a grant outside of the regulations of 1828:

> "Neither side in this controversy disputes the authority of the Mexican president to issue the order contained in the dispatch."

The dispatch in question expressly required the concurrence of both the governor and the departmental assembly in the making of the proposed grant, and the court said (page 284):

> "All we mean to decide in this connection is, that by the true construction of the dispatch, the act of adjudication cannot be held to be valid without the concurrence of the departmental assembly as well as that of the governor. In this respect the provision differs essentially from that contained in the regulations of 1828." * * *
> "Other differences between the regulations of 1828 and the provisions of that dispatch might be pointed out, but we think it unnecessary, as those already mentioned are deemed to be sufficient to show that the decisions of this court, made in *cases arising under these regulations*, have no proper application to the question under consideration."

On perusal of the colonization law of 1824, we find that it declares certain general rules and principles of colonization, with express reference to the prescribed action of the several state legislatures toward putting them into practical effect within their

respective jurisdictions, but, regarding the application of its provisions to the "territories," it merely ordains, by the eighteenth article, as follows:

> "The government [that is, the supreme executive], in conformity with the principles established in this law, will proceed to the colonization of the territories of the republic." (1 White 601, 602.)

At the date of our grant, and for several subsequent years, such provinces as by the constitution of 1824 were styled "territories" were organized provincial communities governed substantially as they had been under the Spanish crown, and living under the old laws, usages and customs as interpreted by the simple-minded villagers and peasants by which each provincial government was usually administered. In New Mexico the legislature was still the "provincial deputation," although official and private persons might occasionally see fit to call it the "territorial deputation." The executive was still the "political chief." The legislature did not become the "departmental assembly," nor the executive the "governor," until the establishment of the "central" form of government under the "*bases constitucionales*," formulated the twenty-third of October, 1835, and promulgated in Mexico on the third of November of the same year. (4 "México," 357.)

In the heat and conflict of the revolution, as well as of the incidental political plots and schemes, the various provincial autonomies went on, with their governmental and official proceedings, under the old momentum, and were not given by the so-called Mexican congresses any directions, rightful or wrongful, to the contrary.

The genesis of these autonomies, from the provincial condition in which they were left by the

abandonment of the mother country to the less independent condition which resulted from specific national legislation or usurpation in the last decade of Mexican sway, involved the law of custom, which always controls a community not embarrassed by specific constitutional or statutory limitations. In these circumstances, the political chief and provincial (or "territorial") deputation of New Mexico, comprehending all the executive, legislative and judicial faculties appropriate to the execution in that province or territory of the colonization law of 1824, were, if it was in force there, the natural instruments of the supreme executive of the republic in the application of its principles to local colonization. If, as assumed by the majority of the court below in its opinion, the passage of the colonization law of 1824 effected by implication an immediate repeal and abrogation of the former powers of the authorities of New Mexico, or of any thereof, in the alienation of the public domain, still, by the very terms of the colonization law itself, art. 16, it was provided:

> "The government, in conformity with the principles established in this law, will proceed to the colonization of the territories of the republic."

Therefore, if the colonization law was in force in the "territories," it became at once the right and the duty of the supreme executive (at first a triumvirate, but afterwards the president of the republic) to take such discretionary measures as might seem meet to that official power for the subjection of the territorial vacant lands to private ownership. In the execution of this very comprehensive executory authority, the "executive power" or the substituted "president," was limited by no technicalities or formalities, and they might respectively select their

own agencies, instrumentalities and forms of procedure. They might act in special cases only or they might ordain a general rule applicable to all cases whatever. In one case they might act secretly and even with partiality; in another case they might pursue a contrary policy. They were given an extremely broad and arbitrary power, almost dictatorial in nature, and their only limitations were the fundamental "principles" declared in the colonization law. This great executive power was never qualified or formulated by any code of procedure until the same executive authority (then vested in the president) promulgated the regulations of 1828. In those regulations appears for the first time the plan of a definite procedure, in pursuance of which the territorial political chief became the primary official actor in a territorial grant proceeding and the territorial legislature became his ancillary adviser. But in the interim between 1824 and 1828 the supreme executive, if the colonization law could be deemed operative, still possessed in full vigor the almost arbitrary power of alienating the territorial public lands. Manifestly it was most convenient for the triumvirate or the later president to execute this power through local agencies. This is proved by the selection of local agencies in 1828. What dispositions of the vacant lands of the territories were made in the interim the supreme executive would appropriately make through the local authorities—*e. g.*, the provincial (or "territorial") deputation or political chief, or both together. The deputation having long exercised the power of alienating the public domain under the Mexican construction of the decree of the cortes of the fourth of January, 1813, it was very natural for the supreme executive to select that legislative body as one of the agents

for effecting colonization prior to the more complicated system introduced by the regulations of 1828.

Upon the theory of the abrogatory effect of the colonization law, the deputation and political chief could act in the alienation of the public domain only by the direction or with the assent, original or confirmatory, of the supreme executive. But they did act openly, solemnly, after extreme deliberation, during a period of four years, in course of which they made numerous grants. Since they could on this theory act lawfully in such cases only as agents of the supreme executive, what is it our duty to presume? Shall we presume usurpation and fraud, or shall we presume the concurring will of the supreme executive? For a quarter of a century these grants were extant as private estates, conferred and accepted as public donations, and not a word of disapproval or disavowal on the part of the supreme executive was heard or written. Is nothing favorable to the grantees to be inferred from this long acquiescence? Is nothing favorable to be inferred from the fact that these grants were respected as valid possessions, even after the regulations of 1828, and no political chief or governor ever pretended to criticise them or disavow them or regrant the same lands? If the fount of power in respect of such grants was the quasi-dictatorial executive of Mexico, and that power, in the choice of agencies or means of communication, was hedged in by no more restrictions than the deposed king had been when he reigned, why cannot we assume that the streamlets of authority, found in apparent descent from that source, originated there? Good faith is presumable rather than fraud; legitimacy rather than illegitimacy. No repugnant statute being in the way, we may reasonably and logically rely, in these circumstances, upon the presumption

so frequently invoked by this court to sustain the action of Spanish subordinate officials, and also equally invoked by it in *United States vs. Peralta*, 19 How. page 347, to sustain the action of a Mexican governor; the court saying in the cited case, as it had substantially said several times before:

> "We have frequently decided that the public acts of public officers, purporting to be exercised in an official capacity and by a public authority, are not presumed to be usurped, but that the legitimate authority had been previously given or subsequently ratified. To adopt a contrary rule would lead to infinite confusion and uncertainty of title."

In *Gonzales vs. Ross*, 120 U. S. 605, the court said (at page 619) in support of the assailed official acts of Soto, a commissioner concerned in the distribution of public lands:

> "A strong circumstance in favor of this conclusion is the fact that Soto's official acts as commissioner in this case were never repudiated by the government; on the contrary, his protocol was received and deposited in the public archives, where it still remains. His official acts, accepted and acquiesced in by the government, must be considered as valid, even if done by him only as a commissioner *de facto;*" and again, at page 622, "All favorable presumptions will be made against the forfeiture of a grant. As before said, it will be presumed, unless the contrary be shown, that a public officer acted in accordance with the law and his instructions. The government accepted Soto's acts, and it does not appear that any attempt was ever made to revoke or annul his proceedings, or to assert a forfeiture for the cause now insisted on."

There being, then, no unyielding method of procedure laid down on this subject until several years after 1825, we find legitimate occasion for invoking a presumption favorable to the integrity of official action and to the validity of a private possession long and peaceably enjoyed. Since the colonization law commanded the supreme executive to "proceed to the colonization of the territories of the republic," it would be unseemly (if we treat it as an operative law) to assume that the executive was for four years utterly unmindful of the duty to obey; and since this duty existed and during those four years many tracts within the territories were, in harmony therewith, colonized in good faith by Mexican citizens inducted into possession with great formality under the express sanction of the local government purporting to act within its lawful authority, we must presume that these colonizations occurred with the sanction, express or implied, of the supreme executive, through lawful official agents.

In view of the political condition of New Mexico at the time, we may well say, as the court did in reference to a grant by a California governor made in 1820, and further ratified in 1822:

> "The presumption arising from the grant itself makes it *prima facie* evidence of the power of the officer making it, and throws the burden of proof on the party denying it."
>
> *United States vs. Peralta*, 19 How., p. 347.
> *Curtis' Commentaries*, § 304.

While the regulations of 1828, after due promulgation and acceptance in the provinces or territories, might to a certain extent displace the law of presumption as held in *United States vs. Cambuston*, 20

How. 59, at pages 63 and 64, still, in the absence of those regulations, that law as interpreted by the court in the Louisiana and Florida cases, as well as in the California case first above cited, ought to support by presumption the action of the Mexican territorial governments in the granting of lands prior to 1828. Even the Cambuston case (20 How. 63, 64) admits that custom may modify a promulgated statute.

Under a subsequent head of this brief (FOURTH POINT) we show why, on grounds of presumption and prescription, as well as under the principles of public law and political equity, our title should be confirmed to the full extent of our claim, unrestricted by the eleven leagues limitation of the colonization law, and we there present reasons and authorities which, if our grant is at all affected by that law, are equally applicable in support of the very reasonable presumption that the supreme executive sanctioned, either by original consent or subsequent ratification, the official means by which the title was conferred. In this connection, however, we cite, as a cogent authority on the subject of such presumptions, the case of *Fletcher vs. Fuller*, 120 U. S. 534, 545 to 548. There the court held the trial judge to have been in error in refusing to instruct the jury "that the presumption they were authorized to make of a lost deed was not necessarily restricted to what may fairly be supposed to have occurred, but rather to what may have occurred and seems requisite to quiet title in the possessor." The court (*Ib.*, 545) adopted the opinion of Sir William Grant, in *Hillary vs. Waller*, 12 Ves. 239, 252, that such presumptions "do not always proceed on a belief that the thing presumed has actually taken place. Grants are frequently presumed, as Lord Mansfield says, *Elbridge vs. Knott*, Cowp. 215, merely for the purpose and

from a principle of quieting the possession." It added (*Ib.*, 547), "It is sufficient if the evidence leads to the conclusion that the conveyance might have been executed and that its existence would be a solution of the difficulties arising from non-execution." It approved (*Ib.*, 547) the doctrine of presumption of title from long possession as laid down in *Edson vs. Munsell*, 10 Allen, 557, 568, wherein the court said that the presumption "is not founded on a belief that the grant has actually been made in the particular case, but on the general presumption that a man will naturally enjoy what belongs to him, the difficulty of proof after lapse of time, and the policy of not disturbing long continued possessions." The court also cited *Casey's Lessee vs. Inlows*, 1 Gill, 430, 503, wherein it was said that "it is frequently the duty of the jury to find such presumption, as an inference of law, although in their consciences they may disbelieve the actual execution of any such grant," and also *Williams vs. Donell*, 2 Head, 695, 697, wherein it was said that "it will be a sufficient ground for the presumption to show that, by legal possibility, a grant might have issued. And this appearing, it may be assumed, in the absence of circumstances repelling such conclusion, that all that might lawfully have been done to perfect the legal title was in fact done, and in the form prescribed by law." The same rule of presumption was again adopted by the court in most emphatic terms in the case of *United States vs. Chaves*, 159 U. S. 452, on appeal from the Court of Private Land Claims; the court saying (*Ib.*, 464):

> "It is the general rule of American law that a grant will be presumed upon proof of an adverse, exclusive and uninterrupted possession for twenty years, and that such rule will be applied as a *presumptio*

juris et de jure, wherever, by possibility, a right may be acquired in any manner known to the law;" and adding: "Thus, also, though lapse of time does not, of itself, furnish a conclusive bar to the title of the sovereign, agreeably to the maxim *nullum tempus occurrit regi;* yet, if the adverse claim could have a legal commencement, juries are advised or instructed to presume such commencement, after many years of uninterrupted possession or enjoyment. Accordingly, royal grants have been thus found by the jury, after an indefinitely long continued peaceful enjoyment, accompanied by the usual acts of ownership.

"The principle upon which this doctrine rests is one of general jurisprudence, and is recognized in the Roman Law and the codes founded thereon, Best's Principles of Evidence, § 396, and was, therefore, a feature of the Mexican law at the time of the cession."

Our grant was protected by this presumption of the favorable intervention of the supreme executive (if that authority had any jurisdiction) at the very moment of its origin, and that presumption has grown stronger day by day until after the lapse of upwards of seventy years it has now become unassailable.

In *Mitchel vs. United States*, 9 Pet., at page 761, the court said:

"The length of time which brings a given case within the legal presumption of a grant, charter or license, to validate a right long enjoyed, is not definite, depending on its peculiar circumstances. In this case, we think it might be presumed in less time than where the party rested his claim on prescriptive possession alone. There is every evidence short of the sign manual or

> order of the king approving and confirming this grant, and, if that were wanting to secure a right of property to lands which have been held as these have been, the law would presume that it once existed, but was lost in the lapse of time and change of governments. The more especially as, by the laws of Spain, prescription for the period of ten years has the same effect as twenty by the principles of common law."

On the same principle the order of the supreme executive should be presumed in the present case, if, on any theory, the colonization law can be deemed of relevant importance.

In *The Pueblo Case*, 3 Sawy, at pages 556 and 557, it appears that the land commissioners considered an objection that the territorial proceeding for the establishment of the pueblo of San Francisco had never been approved by the supreme government; saying:

> "The existence of the pueblo appears to have been uniformly recognized by the public authorities from that time, and its civil officers continued in the exercise of their functions without any question as to their authority or the legality of their acts up to the change of government, a period of nearly twelve years. Such approved, therefore, according to well known legal principles, would be presumed."

On the argument of this cause in the court below, special stress was laid upon the proposition, hereinafter discussed, that our grant is entitled to confirmation on general grounds of presumption, prescription and political equity, existing independently of the terms of the colonization law. The first opinion of the court, as pronounced from the bench, but not filed in the case, led to our motion for a

rehearing (*Transcript*, fol. 220), and it was only after the denial of that motion and the adjournment of the court that the opinion in its present form (*Ib.*, fol. 208) was filed. This opinion undertakes to answer the suggestion, made on the motion, that the concurrence of the supreme executive in the making of the grant, or at least due ratification, ought to be presumed. The court says (*Ib.*, fol. 221) on this subject:

> "If the petition, grant and other proceedings, on the part of the provincial deputation and political chief, had shown an intention to carry out the general policy of the colonization law of 1824, the contention of counsel *would be entitled to great weight.* But, on the contrary, the records show that neither the petitioner nor any one else connected with the entire transaction had any idea whatever of complying with any of the provisions of that law. The grant is for more than twice the quantity of land grantable under the law, and includes land which had been previously granted by the Spanish government," etc.

It seems plain that the honored justice who wrote this opinion had in mind the subsequent regulations of 1828 when he considered the mere formal parts of the proceedings, such as the petition, grant, etc. In 1825, at the date of the grant, there had been no provision made, either by the statute itself or by executive regulations, respecting any formal procedure whatever in making grants in the territories. The only conditions provided were observance of the "principles" established by that law and observance of the will of the supreme executive manifested by that authority in any manner. The controlling "principles" were the prompt colonization of the public domain, by foreigners and citi-

zens, with certain preferences to the latter class of colonists, and with due regard to the personal merits of applicants. Surely the proceedings of the petitioner, the political chief, the provincial deputation, and the alcalde who delivered the juridical possession were all in full harmony with these "principles" and tended to effectuate the very purpose of the law. It has never heretofore been held important for high public functionaries to recite in their official proceedings the laws under which they act. Such laws form by implication a part of such proceedings, just as the law of contracts enters into all private contracts, although not therein mentioned. It is true that the grant, according to the boundaries asked and granted, and as ascertained and determined by the court, exceeds in extent eleven square Mexican leagues, although counsel for the United States struggled earnestly to show that the area affected was less in quantity than that number of leagues, and it is equally true that a part of the granted lands was carved out of the common pueblo lands of the towns of Socorro and Sevilleta.

But, as demonstrated in our SECOND POINT *(infra)*, the provincial or territorial government had a perfect right to grant any part of the common lands of these towns, and, as to the question of alleged excess in the quantity of our grant, it is evident that there appeared nothing on the face of the papers to indicate the actual number of leagues comprehended within the boundaries asked. This observation is equally true of the Pablo Montoya, Preston Beck and other grants alluded to by the court in its opinion. Besides, even up to the time of the Mexican cession, it appeared to be an open question among Mexican officials whether or not the eleven leagues limitation of the colonization law extended to the cases of grants to Mexican citizens;

for we find numerous grants made by territorial governors after 1828, in professed conformity with the colonization law, which were, nevertheless, greatly in excess of eleven square leagues each; as, for instance, the Sangre de Cristo grant (*Tameling vs. U. S. Freehold, etc., Co.*, 93 U. S. 644), the Maxwell grant (*Maxwell Land Grant Case*, 121 U. S. 325; 122 U. S. 365) and numerous others which our Congress has confirmed. Therefore, none of the facts mentioned in this opinion can be taken to indicate an "intention" to disregard the colonization law.

In view of the long continued possession and claim under the grant and the manifest equities attending the title in favor of the claimant, it would be an ungenerous quibble, unworthy of a great nation, to seek at this late day to disavow the grant, because it embraces an excessive area, rather than (in case it be deemed subject to the "principles" of the colonization law) to relegate it to the category of grants of legal quantity included within a larger area, such as were considered in *Van Reynegan vs. Bolton*, 95 U. S. 33, and like cases, and remit the claimant to his selection of eleven square leagues only (over and above the town lands granted) under the doctrine of *United States vs. Vallejo*, 1 Wall. 638, and *United States vs. Armijo*, 5 Wall. 444.

Indeed, it is well settled that a grant may be good for part of the land granted, and bad as to other parts of the same. *Winn vs. Patterson*, 9 Pet. 663; *Patterson vs. Jenks*, 2 *Ib.* 216; *Mitchel vs. United States*, 9 *Ib.* 733.

After the promulgation of the regulations of 1828, there can be no doubt that a grant made, as ours was, with the full concurrence of all branches of the territorial government—executive,

legislative and judicial—and in the same formal way precisely, would have been deemed competently made, and would have been an unassailable title (at least to the extent of the town lands and eleven square leagues additional), especially when fortified by a subsequent long continued, uninterrupted and peaceable possession maintained by a Mexican citizen in good faith. It appears that this title, with its attendant possession and claim, and with its record muniments set out at length in the public official journals and archives of the government, open to perusal by all its high functionaries, remained notorious and unchallenged in the very sight of the granting officers of the territory for the period of twenty years after 1828, without a murmur of discontent or objection from any official or citizen. No further argument is needed to show the applicability of a beneficial presumption of regrant or ratification by the proper authorities of New Mexico.

SECOND POINT.

SO MUCH OF THE GRANTED LAND AS WAS CARVED OUT OF THE COMMON LANDS OF THE TOWNS OF SOCORRO AND SEVILLETA WAS WITHIN THE JURISDICTION AND JUS DISPONENDI OF THE TERRITORIAL GOVERNMENT.

It is undisputed that a considerable part of the grant in question was expressly and designedly taken by the territorial government out of the common lands of the settlements or "*poblaciones*" of Socorro and Sevilleta. (*Transcript*, fols. 14, 15, 20 and 21.) It appears that Socorro—"San Miguel del Socorro"—was a municipality under the jurisdiction of an "*ayuntamiento*" or town council, and of an alcalde. (*Ib.*, page 10, fol. 17; page 14, fol. 23.) It may well be inferred that Sevilleta had a similar municipal organization or was attached to the same juris-

diction. In the granting papers it is treated as being on the same footing as Socorro.

There seems to be no occasion to pursue a minute inquiry into the origin of these "poblaciones" or pueblos. As a general thing the small municipalities of Spain, including those in her colonies, grew by a natural social process out of the mere settlement of appropriate tracts of land by Spanish subjects. The gradual introduction into such settlements of prescribed rules of government is shown by Escriche under the head of "*Ayuntamiento*." Divers royal ordinances and decrees on the subject are found in the compiled laws of the Indies (Hall, Ch. VII), and specific provisions respecting town governments were made by the Spanish constitution of March 18, 1812 (Hall, Ch. VII, § 127), as well as by laws conformable thereto (1 White, 416, 417, 418). By article 309 of this constitution, it was provided that the ayuntamiento, or town council, should be composed of one or more alcaldes, certain elected citizens (councilmen or aldermen) and a corporation attorney, and should be under the presidency of the political chief (Hall, § 127). By the decree of the cortes of the fourth of January, 1813 (Hall, §§ 88, 89, 92), it was provided that all the vacant crown lands and municipal property, except the commons "*necessary*" for the towns, "should be reduced to private property," and the provincial deputations were required to devise means for carrying out the scheme of alienation of the municipal as well as the crown lands contemplated by this decree, and make reports on the subject to the cortes for its further action. (*Ib.*, § 92.) We have no express evidence as to what reports were made or considered by the cortes under these provisions, but, of course, the subsequent customary action of the several provincial

deputations and their successors in authority suggests the presumption that the decree had been duly obeyed and rendered effective, with all proper official sanction.

The court below was wrong in assuming that this decree of the cortes was permanently repealed. (*Transcript*, fol. 210.) Although Ferdinand VII., on his restoration, repealed it by the royal cedula of the eighth of July, 1814 (Hall, § 109), it was revived in 1820 with the constitutional régime of that year. (*Ib.*, § 109.) 6 Decretos de las Cortes, 345.

Moreover, under the Spanish and Mexican law, actual promulgation of a Spanish or Mexican decree or statute, in a province or governmental district designed to be affected thereby, was essential before it could become effective there (Escriche, "*Promulgacion*," *Gonzales vs. Ross*, 120 U. S. 605, 616), as was, indeed, the rule respecting the British royal orders relating to the American colonies (*Albertson vs. Robeson*, 1 Dallas, 9); and the very fact that the old law continued to be recognized and enforced in a Spanish or Mexican province, territory or colony, after its repeal by the supreme government, is evidence that promulgation of the new law had not yet been made, or else that the former law, if ever repealed, had been revived. *Gonzales vs. Ross*, 120 U. S. 605, 615:

> "But the laws of the Mexican states did not take effect in any part of the country until they were promulgated there. * * * Besides, the commissioner was a public officer, having a public duty to perform, and, in the absence of evidence to the contrary, the presumption would be that he acted in accordance with the law as known at the time."

See also *Houston vs. Robertson*, 2 Texas, 1, 28.

Even if the interpretation of their authority under the law by the Mexican officials who constituted the territorial government — executive, legislative and judicial—was mistaken in any respect, that interpretation became sanctified by usage, general and long continued. *Communis error facit jus.* The same principle is seen in our own jurisprudence—erroneous decisions of the highest court of a state entering into the general body of the law of the state and consequently into all contracts made during their extancy; so that, notwithstanding a subsequent judicial correction and overruling of such decisions, the contracts made on the faith of their exposition of the law continue of binding force and are protected by the federal constitution. (*Douglass vs. Pike County*, 101 U. S. 677, 686, 687.) "*A well known rule of statutory construction* remains in force until it shall be abolished by congress." *Arthur vs. Morrison*, 96 U. S. 108.

Hall declares that "there existed no general law or decree of the sovereign designating the manner of issuing such titles" to specific portions of pueblo lands (Hall, § 135), and — such is the obscurity of the whole subject—he states reasonable grounds for questioning the opinion several times expressed by this court as to the legal limits of pueblo grants (*Ib.*, § 118), and as to the power of alcaldes to allot parcels thereof (*Ib.*, § 138). It seems safe to assume that the high Mexican functionaries concerned in the distribution of territorial lands among resident citizens knew at least as much of the sources of their authority as we can possibly learn at this late day. They must be conceded the same right to blunder in construing the law as we concede to our trial judges and land officers, whose judicial errors, committed within jurisdictional limits, are not deemed usurpations, but, on the contrary, are

permitted to crystallize as the "law of the case," in the absence of an appeal. Doubts as to the nature and extent of official powers are universally resolved by defining and measuring them consistently with the customary practices and usages of the officials concerned in their execution. *United States vs. Johnston*, 124 U. S. 236; *United States vs. Hill*, 120 U. S. 169; *Vide etiam*, 120 U. S. 52; 113 U. S. 568; *Ib.* 727; 111 U. S. 412; 107 U. S. 402; 95 U. S. 760; 23 Wall. 374; 16 Wall. 240; 12 Wall. 177; 21 How. 35; 7 Pet. 1; 12 Wh. 210; 6 Wh. 264; and 1 Cranch 299.

Our courts, in considering titles originating in the grants of parcels of pueblo lands, under the laws, usages and customs of Mexico, have always regarded with respect the action even of a mere alcalde, in assuming the right to dispose of them.

Cohas vs. Raisin, 3 Cal. 444.

When parcels of the vacant lands of a pueblo have been granted to private citizens, whether by the political chief, the alcalde, the provincial deputation, the territorial deputation or the departmental assembly (as these legislative bodies came successively into being), the private titles so conferred have always been respected. It has been assumed that the action of such officials in such cases proceeded under lawful authority. In *Merryman vs. Bourne*, 9 Wall. 593, the court declared that, before the Mexican cession, "the pueblo or village of San Francisco existed, and under the laws of the country was entitled to the territory, within certain prescribed limits, known as pueblo lands. It had also an ayuntamiento or town council, and an alcalde. The alcalde was the chief officer of the pueblo and, as such, had authority to make grants of the pueblo lands. The exercise of this function was subject to

the authority lodged in the ayuntamiento, and to the still higher authority of the departmental governor and assembly."

See also *The Pueblo Case*, 3 Sawy. (C. C.) 553. In *United States vs. Pico*, 5 Wall. 536, it was held that "the disposition of the lands assigned [to a pueblo] was subject at all times to the control of the government of the country." To the same effect is *Grisar vs. McDowell*, 6 Wall. 363.

Our record title shows a recital in the report of the political chief "that to the residents of the said new settlements *(poblaciones)* there remain most ample lands for pastures, fields, uses and transits, so that the land which may be granted to Chaves will cause them not the least scarcity, as on another occasion none occurred to Belem from that granted to Sabinal and even to Sebilleta itself, although it was an appurtenance of the first." (Amended translation of the Spanish in *Transcript*, fol. 15.) This recital indicates the right assumed by the local authorities to dispose of the vacant pueblo lands. It will also be noticed that, when the alcalde of Socorro, under the authority of the political chief and provincial deputation, delivered juridical possession, he was accompanied by two aldermen ("regidores") of the ayuntamiento of Socorro. (*Ib.*, fols. 17 and 23.) Here, then, we have the case of a perfect title duly vested in a Mexican citizen in the spring of 1825. If considered only "*titulo colorado*," or color of title, it was, by reason of the good faith which attended it and the long possession and claim thereunder, the basis of a prescription which matured as early as 1835. Escriche defines "Titulo Colorado" as "El que se funda en alguna apariencia de razon y de justicia,—el que tiene la apariencia de la buena fé pero que no es suficiente para transferir por sí solo la propiedad, sin el auxilio de la posesion y prescripcion."

That so much of our title as is thus derived out of the pueblo lands of Socorro and Sevilleta is wholly outside of the scope of the colonization law of 1824 is plain from the fact that such lands were not part of the vacant public domain, to which the colonization law was limited by its own express terms. (*United States vs. Workman*, 1 Wall., at page 761.)

Indeed, pueblo lands were expressly excepted from its provisions by the second article. (Hall, § 489.)

When, on the twenty-first of November, 1828, three years and upwards after the making of our grant, the Mexican government formulated the familiar regulations of 1828, it expressly recognized the old laws, usages and customs as being of continuing vitality, by the declaration in the thirteenth regulation, that a new town should "follow in its formation, interior government and policy, the rules established by the existing laws for the towns of the republic." (Hall, § 516.)

Finally, the law of presumption and prescription, discussed in our FIRST POINT, *supra*, and our FOURTH POINT, *infra*, affords absolute security to this as well as every other part of our title.

It is to be noted that the eleventh article of the colonization law of 1824, which restricts the area to be granted to any one person in fee (*como propiedad*) to eleven square leagues, is intended to express the limit of granting power *under that law*, but not to deny to any citizen the capacity to acquire eleven square leagues as a colonist, even though, by purchase of private or municipal property not within the scope of the colonization law, he already owned considerable land; nor to debar him from adding to his estate, either contemporaneously with a colonization grant or subsequently, any quantity of purchased private land over and above the eleven leagues sought or granted in colonization.

THIRD POINT.

OUR TITLE PRESENTS, IN ADDITION TO ITS PERFECT LEGAL CHARACTER, EQUITIES WHICH IT IS THE DUTY OF THE COURT TO DECLARE AND ENFORCE UNDER THE TREATY AND THE LAW OF NATIONS.

Although a majority of the justices in the court below seem in the opinion to have taken a narrow view of its jurisdiction and thus failed to appreciate fully the high political faculties with which it is endowed for the just interpretation of Mexican titles, in the light of the treaty stipulations, the laws and ordinances of Spain and Mexico, the law of nations and the "principles of public laws," as specifically enjoined by the statute (26 Stat., page 854, §§ 7, 13); yet this court, inspired with the same spirit of political equity which it manifested in Marshall's time, declares that it does not "perceive in any feature of the act [establishing the land court] an intention on the part of congress to restrict the powers of the court recognized by the previous decisions."

> *United States vs. Chaves*, 159 U. S. 452, 459.

The statute in question is simply an outgrowth of the earlier statutes enacted for the purpose of settling by judicial intervention the numerous private land claims which claimed protection under our treaties with France, Spain and Mexico. Indeed, all these statutes are kindred and, being *quasi in pari materia*, they should be considered together, *reddendo singula singulis*. Sutherland, §§ 282, 283, 284. And, upon the same principle, all parts of the act should be read together, in order to determine the scope of the whole. In this connection, the case of *United States vs. Arredondo*, 6 Pet. 691, is exceedingly pertinent. There we find a most wise and

thorough exposition of the nature of the political duty to which such statutes relate, and also of the true meaning of their terms.

The statutes there considered provided for the jurisdiction of private land claims existing "by virtue of any grant, concession warrant or order of survey," such as the country of their origin might have "perfected into a complete title, under and in conformity to the laws, usages and customs of the government under which the same originated," etc.

In the act now in question, substantially the same phraseology is employed, except that the word "survey" is used without being preceded by the words "order of,"—perhaps because, in the territory derived from Mexico, the technical "order of survey," familiar in the granting procedure of Louisiana, was practically unknown; the "survey" of grants in such territory being almost always the act of juridical possession itself, which went in execution of the granting decree or order.

As the words "grant, concession, warrant or survey" were borrowed substantially from the statutes relating to Louisiana and Florida construed in the Arredondo case, so also were many other important provisions which are common to these early statutes and to the later one now under discussion. For instance, the provisions which invoke for the guidance of the adjudicating tribunal the "stipulations of the treaty," the "laws and ordinances" of the former governments, the "law of nations" and the "principles of public law," together with the requirement that the court concerned should determine "all other questions properly arising between the claimants and the United States." (26 St. 857, § 7; 6 Pet. 709 *et seq.*)

Clearly, in consenting by legislation to devolve on the courts the noble and delicate political duty,

primarily vested in congress, of carrying out the treaty provisions designed for the protection of proprietary interests held by citizens of the former governments in the lands embraced within territorial cessions, congress intended to secure in good faith, by means of the selected instrumentalities, the discharge of that duty in a spirit befitting the honor and dignity of a great nation, and therefore it committed to its judicial delegates the administration, not simply of juridical equities, such as are familiar to a court of chancery, but also of those broader and more generous equities which arise out of the law of nations and the "principles of public law."

Although, in the earlier statutes (6 Pet. page 713), the courts were expressly directed to have regard to the prior acts of congress in the confirmation of similar claims, with a view apparently to being guided by the opinion of the political department, upon their equitable merits, and no such direction expressly appears in the act in question, still, in the exercise of functions of a political nature, it is only seemly for all delegated tribunals to consider with respect, if not with deference, the political judgment passed on similar subjects by the national legislature when acting thereon directly in construction and performance of the treaty obligations of the government. The court, in the Arredondo case, declared a general doctrine respecting the weight of such legislation as a precedent, when it said what is quite as true in the absence of a legislative direction as in its presence (6 Pet. page 713):

> "When congress have, by confirming the reports of commissioners or other tribunals, sanctioned the rules and principles on which they were founded, it is a legislative affirmance of the construction put by these tribunals on the laws conferring the author-

> ity and prescribing the rules by which it should be exercised, or which is, to all intents and purposes, of the same effect in law. It is a legislative ratification of an act done without previous authority, and this subsequent recognition and adoption is of the same force as if done by pre-existing power, and relates back to the act done."

And, in the later case of *Mitchel vs. United States*, 9 Pet. 555, the court also said:

> "A confirmation of similar grants made by acts of congress, or by boards of commissioners acting under their authority, are also *powerful evidence* of a lawful exercise of the authority of these officers."

These observations are significant in connection with the fact that congress has several times confirmed grants made before the year 1828 by the provincial or territorial deputation of New Mexico, or by the political chief with its concurrence, such as the Pino or Preston Beck grant (*Stoneroad vs. Stoneroad*, 158 U. S. 240), Report No. 1; the Agua Negra grant, Report No. 12; the Pedro José Perea grant, Report No. 16 (made contemporaneously with our grant), and others confirmed by the act of congress of the twenty-first of June, 1860 (12 Stat., c. 167, p. 71). *Vide* Report No. 321, pages 257 to 268, H. R., 36th Congress, first session; also confirmation of the Pablo Montoya grant, Report No. 41, 15 Stat., p. 342.

Confiding purchasers of unconfirmed titles of like character were naturally induced by these confirmations to regard their titles as coming within the political principle so solemnly acknowledged.

In the Arredondo case (6 Pet., page 714), the court defines "laws and ordinances," as used in these statutes, and declares that usages and customs

existing under the former governments are to be deemed part of their laws and ordinances, saying (*Ib.*, 714, 715):

> "There is another source of law in all governments, — usage, custom — which is always presumed to have been adopted with the consent of those who may be affected by it. In England and in the states of this Union which have no written constitution, it is the supreme law, always deemed to have had its origin in an act of a state legislature of competent power to make it valid and binding, or an act of Parliament, which, representing all the inhabitants of the Kingdom, acts with the consent of all, exercises the power of all, and its acts become binding by the authority of all. 2 Co. Inst. 58; Wills, 116. So it is considered in the states and by this court. 3 Dall. 400; 2 Pet. 656, 667.
>
> "A general custom is a general law and forms the law of a contract on the subject matter. Though at variance with its terms, it enters into and controls its stipulations as an act of Parliament or state legislature. * * * The court not only may, but are bound to notice and respect general customs and usages as the law of the land, equally with the written law; and, when clearly proved, they will control the general law. This necessarily follows from its presumed origin: an act of Parliament or a legislative act. Such would be our duty under the second section of the act of 1824, though its usages and customs were not expressly named as a part of the laws or ordinances of Spain. * * * We cannot impute to congress the intention to not only authorize this court, but require it to take jurisdiction of such a case, and to hear and determine such a claim according to the principles of justice, by such a solemn mockery of it as would be evinced by exclud-

> ing from our consideration usages and customs which are the law of every government, for no other reason than that, in referring to the laws and ordinances in the second section, congress had not enumerated all the kinds of laws and ordinances by which we should decide whether the claim would be valid if the province had remained under the dominion of Spain. We might as well exclude a royal order because it was not called a law. We should act on the same principle if the words of the second section were less explicit, and according to the rule established in *Henderson vs. Poindexter*. See 12 Wheat. 530, 540."

Then follow, in the Arredondo case (6 Pet. 716 *et seq.*), instructive observations on the statutory references to "all other questions properly arising between the claimants and the United States," the testimony of witnesses, since deceased, taken in preliminary investigations of claims, and other evidence mentioned in the statutes, the treaty stipulations, the principles of law, and the law of nations; the court saying (6 Pet. 717):

> "From a careful examination of the whole legislation of congress on the subject of the Louisiana and Florida treaties, we cannot entertain a doubt that it has from the beginning been intended that the titles to the lands claimed should be settled by the same rules of construction, law and evidence, in all their newly acquired territory; that they have adopted as the basis of their acts the principle that the law of the province in which the land is situated is the law which gives efficacy to the grant, and by which it is to be tested whether it was property at the time the treaties took effect.
>
> "The United States seem never to have claimed any part of what could be shown by

legal evidence and local law to have been severed from the royal domain before their right attached."

As illustrative of the growth of a Spanish or Mexican usage or custom in derogation of the written law, we cite the case of *Adams vs. Norris*, 23 How. 353, where the court held that it was competent to invoke in support of a will a custom, prevalent in California, while under Mexican dominion, under which wills were executed in a form contrary to that prescribed by the written law. Mexico admitted by custom and implication the continuance in her political and jurisprudential policy of the former Spanish laws, even in respect of the disposition of the public domain, as in the case of the Spanish mining laws. The old laws, usages and customs became part of the law of the land in the same sense that royal orders, acts of Parliament and the common law of England became incorporated by customary adoption into American jurisprudence, notwithstanding the abjuration of allegiance to the English crown. Provinces which secure autonomy through revolution are in a different position in respect of the application of old laws affecting the alienation of public domain from that of conquered or ceded provinces, although it is intimated in the case of Powers' Heirs, 11 How., pages 577, 579, that such old laws apply to even the latter.

In the colony of New York, the colonial legislature at one time took an active part with the governor in legislation regarding the crown lands. (*People vs. Trinity Church*, 22 N. Y., pages 49, 50.) The successors to the same authorities continued to exercise equivalent functions after the declaration of independence. In some of the colonies, the royal grants gave to the grantees proprietary interests in the soil, in others the king merely delegated his

political dominion and *jura regalia*, and in all there were Indian titles, some of which were unextinguished at the formation of our Union. We believe that in no instance did the federal government undertake to repudiate a private title to any of these colonial lands emanating from the state governments by their grants to individuals made after the revolution. Voluntary cessions by certain states to the Union of vast tracts of Indian lands quieted the jealousy and discontent which the smaller and poorer states had manifested on the subject of these important titles; but it cannot be pretended that the great question raised, as between the federal government and the states concerned, was ever resolved, unless it be by the general consensus which supported the state claims to what remained unceded.

In *Fletcher vs. Peck*, 6 Cranch, p. 142, Chief Justice MARSHALL said:

> "The question whether the vacant lands within the United States became a joint property, or belonged to the separate states, was a momentous question which at one time threatened to shake the American confederacy to its foundations. This important and dangerous contest has been compromised, and the compromise is not now to be disturbed."

His associate JOHNSON said in the same case (*Ib.* 146):

> "This is a question of much delicacy, and more fitted for a diplomatic or legislative than a judicial inquiry."

Vide 1 Story Const., §§ 227, 228.

1 Kent Com. 259 *et seq.*; 3 *Ib.* 377, Lecture LI.

Commonwealth vs. Roxbury, 7 Gray, 478 to 482.
Johnson vs. M'Intosh, 8 Wh. 595.
Martin vs. Waddell, 16 Pet. 367.

It is noticeable that no question was ever seriously raised as to the right of the separate states to grant vacant crown lands within their actual immediate political control, such as lay within their settled limits, but that the contest of opinion arose out of the theoretical state claims to vast tracts lying generally in the western wilderness outside of their actual possessions.

In our own time we have seen customs established in the disposition of the public mineral lands that have ultimately grown into the dignity of laws; for this court has said that their "tacit recognition" by our government and the courts made it the duty of the government to protect the mining titles which rested on that foundation; referring to miners' claims as "rights which the government had, by its conduct, recognized and encouraged and was bound to protect before the passage of the act of 1866."

Broder vs. Water Co., 101 U. S., p. 276.
Atchison vs. Peterson, 20 Wall. 507.
Basey vs. Gallagher, *Ib.* 670.
Forbes vs. Gracey, 94 U. S. 762.
Jennison vs. Kirk, 98 U. S. 453.

According to the "principles of public law," a like political duty bound the republic of Mexico, after her central powers had become fixed and generally acknowledged, to respect and protect the possessions and titles held under sanction of the old provincial customs and usages—part of "what may be called the common or unwritten law of every civilized

country." (*Fremont's Case*, 17 How., page 557.) Such property fairly comes within the letter and spirit of articles VIII and X of the Treaty of Guadalupe Hidalgo.

"A law is a rule of action." The principles that lead to social equilibrium and harmony involve deference to law. Whenever we find consistent, harmonious official action in the government of any community, we naturally ascribe that action to an antecedent law by which it has been ordained. When the origin of the supposed law is remote, obscure or otherwise impossible of satisfactory ascertainment, we naturally reason from the effect back to the cause. From the customary official action, long recognized in the community as valid, we fairly assume that that action, suggesting a present rule of official conduct, is the result of some authorized command. The law itself, otherwise unascertainable, is inferred from the common acceptance of official acts as legal. In truth, the "rule" may have been declared by some tyrant or usurper, and may have lacked many of the essentials of a valid law; yet such a rule, accepted by the community, may have gained legitimacy by general adoption and, appearing ultimately as a custom, may have attained the highest authority.

It is merely matter of curious speculation to attempt to trace the origin of customary law. We must simply accept it as a thing consummated, just as we accept the laws of etiquette, whether personal or international.

"Usages long established and followed have to a great extent the efficacy of law in all countries. They control the construction and qualify and limit the force of positive enactments" (*Slidell vs. Grandjean*, 111 U. S. 412); and a great lapse of time is not essential to give jurisprudential weight to

usages or customs (*Strother vs. Lucas*, 12 Pet., pages 436, 437), for, even when they are "comparatively of recent date" *(Ib.)* their serious and general acceptance may give to them a sanction equal to that of mere age.

Following the principles of decision laid down in the Arredondo case, the court said, in *Strother vs. Lucas*, 12 Pet., pages 436, 437:

> "This court has also uniformly held that the term 'grant' in a treaty comprehends not only those which are made in form, but also any concession, warrant, order or permission to survey, possess or settle, whether evidenced by writing or parol, or presumed from possession [here citing many cases]; and that in the term 'laws' is included custom and usage, when once settled; though it may be 'comparatively of recent date, and is not one of those to the contrary of which the memory of man runneth not, which contributed so much to make up the common law code, which is so justly venerated' [citing 9 Wheat. 585]. * * * Every country has a common law of usage and custom, both local and general, to which the people, especially those of a conquered or ceded one, cling with more tenacity than to their written laws, and all sovereigns respect them. The people of Kent contended with the conqueror of England till he confirmed their local customs and tenure which continue to this day; and history affords no instance where the people have submitted to their abrogation without a struggle, as was the case in Louisiana, when they found that the laws of France and the custom of Paris were about to be superseded by those of Spain."

Another analogy found in the statutes considered in the Arredondo case and that by which the Court

of Private Land Claims was established is in the legislative classification of grants as either "complete" or "incomplete." 6 Pet. page 718; 26 St. 854, §§ 6, 8, 13. "Incomplete" titles, within the meaning of these statutes, are only such as are merely "inchoate," or "equitable," and do not present, in form, or *by the aid of a beneficial presumption*, a case which indicates a perfect segregation of a specific tract of land from the crown lands or public domain, and its definitive appropriation to private uses, by the consent, express or implied, of the sovereign power. On the other hand, the "complete" titles intended are such as, by reason of their form, or by reason of facts and circumstances which authorize the presumption of a consummate title, require no further aid from the sovereign power to give them forensic standing even against the government.

Beard vs. Federy, 3 Wall. 491.

Still, titles of both kinds are "property" within the protection of the treaty of Guadalupe Hidalgo and of the law of nations.

But they differ in rank and virtue; for incomplete titles depend for their ultimate perfection on the faithful discharge of a high political duty by our government, and complete titles already possess perfection and, when held either by Mexicans or by our own citizens, are under the immediate protection of the constitution, so that their holders may set them up against all aggressions of the government. Titles of the one class are at the mercy of governmental caprice; those of the other class are always entitled to their day in court. Hence, congress can arbitrarily confirm or reject an incomplete title by a mere statute, but cannot question a complete title, except in the court room. Nevertheless, it is true that, in

order to secure a correct delimitation of the public domain, congress may challenge in equity the claimant of a perfect title, establishing for that purpose a judicial jurisdiction analogous to that exercised in chancery in cases of confusion of boundaries and quieting of titles, as was done in California (*Botiller vs. Domingues*, 130 U. S. 238), and is, in a more cautious and merciful way, provided by the Land Court act.

While the case just cited (130 U. S. 238) recognizes the constitutional standing of complete grants and their immunity from impeachment, except in a judicial tribunal, it is only reluctantly accepted by such as believe all valid or colorable possessions to be entitled when assailed to an inquiry by a constitutional jury.

It is thus apparent that our government, dealing with land claimants in the administration of political equities under a treaty of cession, must act *uberrima fide;* for the standard to which it must necessarily conform is even higher than that of gentlemanly honor, and consequently much exalted over what obtains among petty tradesmen and usurers. Its maxim is *Noblesse oblige*. It is a trustee dealing with its beneficiary.

> "This court has defined property to be any right, legal or equitable, inceptive, inchoate or perfect, which before the treaty with France in 1803, or with Spain in 1819, had so attached to any piece or tract of land, great or small, as to affect the conscience of the former sovereign 'with a trust,' and make him a trustee for an individual, according to the law of nations, of the sovereign himself, the local usage or custom of the district, according to the principles of justice and rules of equity."
>
> *Strother vs. Lucas*, 12 Pet., page 436.

Accordingly, this court frowns on sharp and niggardly technicalities in the consideration of the petitions of private land claimants, and denounces the harsh and over-zealous criticism of forensic advocates.

> "Nor is it the duty of counsel representing the government to urge microscopic objections against an honest claimant, and urge the forfeiture of his property for some oversight of the commissioners in not requiring proof according to the strict rule of the common law."
>
> *Per* GRIER, J., in *United States vs. Johnson*, 1 Wall., p. 388.

> "To these observations, so just and pertinent, we will only add that the United States have never sought by their legislation to evade the obligation devolved upon them by the treaty of Guadalupe Hidalgo to protect the rights of property of the inhabitants of the ceded territory, or discharge it in a narrow and illiberal manner. They have directed their tribunals, in passing upon the rights of the inhabitants, to be governed by the stipulations of the treaty, the law of nations, the laws, usages and customs of the former government, the principles of equity and the decisions of the Supreme court, so far as they are applicable. They have not desired the tribunals to conduct that investigation as if the rights of the inhabitants to the property which they claim depended upon the nicest observance of every legal formality. They have desired to act as a great nation, not seeking, in extending their authority over the ceded country, to enforce forfeitures, but to afford protection and security to all just rights which could have been claimed from the government they superseded."

Per FIELD, J., in *United States vs. Anguisola*, 1 Wall., at page 358.

Reserving for our next point a submission of further considerations aiding our contention that the Antonio Chaves grant is a perfect and complete title, we insist with confidence that it is unquestionably at least an equitable title. It is evident that, in its adjudication, the court cannot stop with a severe and critical inquiry into the mere formalities which attended its origin, but that the court is in duty bound to consider, together with its original merits, such others as have attached by reason of long continued possession and claim, governmental acquiescence, legal presumptions and other beneficial circumstances. A "grant" or "survey" open to technical objection, when considered alone as a formal proceeding, may have ripened into a good title, either legal or equitable, by the occurrence of facts and conditions which put it under the protection of the treaty, the law of nations, the "principles of public law," and the sovereign benevolence of our government. The protective stipulations of the treaty are merely declaratory—"the avowal of a principle which would have been equally sacred though it had not been inserted in the contract." *Soulard vs. United States*, 4 Pet. 512; 10 Pet. 330; *Lessee of Pollard's Heirs vs. Kibbe*, 14 Pet., page 390. Since, according to the American construction of the treaty, the equities of claimants thereunder are of political, rather than judicial cognizance, although Mexico, in the formulation of the Protocol, vainly sought to have them remitted to the "ordinary tribunals" of our country, the precedents furnished by our political department are, as we have already shown, persuasive on the courts. Upon this ground, we cited to the court below the case of

Pollard's Lessee vs. Files, 2 How., page 602, although that court seems singularly to have mistaken the only point of the citation, namely, to show what, in the estimation of congress, as well as of this court, is an "equity" founded on an actual settlement under an official permission legally defective. It is well known that Spanish officials, while occupying the disputed lands in Louisiana west of the Perdido river, assumed the right to dispose of them as crown lands. The court said (*Ib.*, page 602):

> "That Spain had no power to grant the soil, during the time she thus wrongfully held the possession, is settled by the cases cited of *Foster & Elam vs. Neilson*, 2 Pet. 254, and *Garcia vs. Lee*, 12 Pet. 515. But the right necessarily incident to the exercise of jurisdiction over the country and people rendered it proper that permits to settle and improve, by cultivation, or to authorize the erection of establishments for mechanical purposes, should be granted. * * * Very many permits to settle on the public domain and cultivate were also granted about the same time, which were in form incipient concessions of the land, and intended by the governor to give title, and to receive confirmation afterwards from the king's deputy, so as to perfect them into a complete title. Pollard's was also of this description. Although the United States *disavowed* that any right to the soil passed by such concessions, still they were not disregarded as giving no equity to the claimant. On the contrary, the first act of congress passed (of April 25, 1812) after we got possession of the country, appointed a commissioner to report to congress on them in common with all others originating before the treaty of 1803 took effect."

What congress regarded in the subsequent steps for confirmation of these imperfect holdings was

clearly the political equity vested in their possessors. In this connection we refer to the elaborate opinion of Mr. Justice ~~McLEAN~~ Baldwin in *Lessee of Pollard's Heirs vs. Kibbe*, 14 Pet., at page ~~566~~ 299, etc., ~~and also that of Mr. Justice BALDWIN, in the same case~~.

It cannot be assumed that congress, after delaying for two score years the giving of any serious attention to the numerous citizens who were craving recognition of their claims under our treaties with Mexico, should at the late day (third of March, 1891) at which the Court of Private Land Claims was created have arbitrarily refused further recognition of any such equities as are under the contemplation and protection of those treaties, unless they come technically within the limited range of our equitable jurisprudence as formulated in our own domestic economy, without reference to international complications; and should with equal arbitrariness have denounced a statutory bar against all equities of Mexican origin not presented to the Land Court within a few prescribed years. On the contrary, we must credit congress with the utmost good faith in its establishment of the Land Court, originally, and this court, on appeal, as the final arbiters of all private land controversies involving color of title, which are politically determinable under the treaties with Mexico and the relevant law of nations; and therefore, since a statutory bar is attached to such equitable claims not presented to the Land Court, we must assume that it has jurisdiction to consider and decide precisely the same equities as congress recognized in like cases which have been confirmed by statute.

If we search the reports of this court on the subject of private land claims against our government considered under treaties with foreign nations, we find that, although the court has frowned on fraud, trickery, usurpation and other phases of

turpitude, it has always been extremely indulgent to claims originating in grants given and taken in honesty and simple faith, and afterwards strengthened and sanctified by long continued occupation and appropriation. For example, in the case of *United States vs. Alviso*, 23 How. 318, it appeared that José Maria Alviso, brother of the claimant, petitioned the governor of California, in 1838, for the grant of a specific tract of land; that the governor permitted him to occupy the tract pending further proceedings; that the governor ordered a local official (the administrator of the ex-mission of San Francisco, etc.) to make a report on the subject; that a local prefect, to whom this order was exhibited in 1839, gave his sanction to the occupation of the land by the petitioner; that the administrator, in 1840, "reported that the land was unoccupied and was not recognized as private property of the mission or any private person;" and that no further proceedings were had. But it also appeared that the claimant, José Antonio Alviso, received from his brother, the original petitioner, a conveyance of the premises, dated in 1840; "that his occupation commenced in 1840 and has continued for fourteen years; that he has improved and cultivated the land, and that his family have resided on it." Thereupon, the court, in sustaining the title, declared:

> "The claimant appears to have been a citizen of the department, and no objection was made or is suggested why he should not have been a colonist of that portion of the public domain he has solicited. No imputation has been made against the integrity of his documentary evidence, and no suspicion exists unfavorable to the *bona fides* of his petition, or the continuity of his possession and claim. He has been recognized as the proprietor of this land since 1840. Un-

der all the circumstances of the case, the court is not willing to disturb the decree in his favor."

It will be seen at once that this case presented a pure question of political equity. There was no concession — only a temporary license to occupy pending the consideration of a petition for a grant, and there was no subsequent official action on that petition. Nevertheless, there was a settlement in good faith by the petitioner's assignee, continued under Mexico for about six years and under our government for about eight years longer. The petitioner was in a situation analogous to that of such settlers in Louisiana as are mentioned in *Pollard's Lessee vs. Files*, 2 How., page 602 *(supra)*, and this court recognized as vested in him the same measure of political equity as congress had recognized as vested in them.

It is to be noted that the claimant Alviso, in the California case cited, contemplated the acquisition of a title to the premises and continued to occupy them in that well founded hope. Therefore, he was in a better position than that of a mere licensee permitted to occupy land for a temporary purpose. Naturally, this court has always seen and indicated the clear distinction between these two classes of possessors. Those in the former category were in possession, as it were, by a "survey" in a preliminary proceeding toward acquiring a title, just as an American settler is under the homestead or mining laws; while those in the latter category were in possession as mere tenants at will or for a limited term, without the expectancy or even hopeful pretense of ever obtaining an abiding title. One class held possession and claim; the other, possession only.

The Pino or Preston Beck grant (*Stoneroad vs. Stoneroad*, 158 U. S. 240), before it had been examined by the surveyor-general preliminarily to its consideration by congress, was the subject of an ejectment suit in New Mexico. (*Pino vs. Hatch*, 1 N. M. 125). When the territorial Supreme court passed upon the case, two of the three justices declined to adjudicate the essential character of the title, but agreed that, whatever question might be suggested as to the power of the provincial government to make a definitive grant in 1823, there could be no doubt that it had the power to give to a Mexican citizen the legal right of possession of a specific tract of the vacant public domain; and, therefore, they sustained the right of the grant claimant to maintain ejectment. In the opinion, they cited the case of *Pollard's Lessee vs. Files*, 2 How., page 602, *supra*. The other justice (BROCCHUS, J.) discussed the merits of the grant title in a masterly opinion, in which he sustained it as complete and perfect. (1 N. M. 133.)

"The terms of a treaty are to be applied to the state of things then existing in the ceded territory." *Strother vs. Lucas*, 12 Pet., page 438; *United States vs. Clarke*, 8 Pet., page 451. "In the treaty of cession, no exceptions were made, and this court has declared that none can thereafter be made; 8 Pet. 463. The United States must remain content with that which contented them at the transfer, when they assumed the precise position of the king of Spain." *Strother vs. Lucas*, 12 Pet., page 446. These principles, declared under the Spanish treaty, are equally applicable to the Mexican treaty.

FOURTH POINT.

THE ANTONIO CHAVES GRANT BELONGS TO THE CLASS OF COMPLETE TITLES AND SHOULD BE CONFIRMED TO THE FULL EXTENT CLAIMED.

The resolution of the question as to the rank of the title is very important to the claimant, since, if the grant is entitled to recognition as a complete one, it embraces the full area claimed and surveyed (130,138 98-100 acres; *Transcript*, fol. 2; also fol. 209, page 114), while, if it is not complete, it can be confirmed only for eleven square Mexican leagues over and above the parts which were carved out of the pueblos of Socorro and Sevilleta. (SECOND POINT, *supra*.)

Further argument is unnecessary to show that these Socorro and Sevilleta portions came to the grantee by a perfect title, for it cannot be pretended that any additional formalities were necessary to perfect the solemn title conferred by the provincial deputation and political chief, with the concurrence of the alcalde. (SECOND POINT, *supra*.) Besides, the possession and claim continued since 1825 added prescriptive confirmation to the title.

2 White's Land Laws, page 739.

As to the more valuable part which was granted out of the public domain lying to the west of the Socorro and Sevilleta public lands, we submit the following demonstration of the complete and perfect character of the title by which the same was acquired by Antonio Chaves:

The question presented involves a study of the political situation of New Mexico in the spring of 1825. when the grant was made.

From time immemorial New Mexico had been an ultra-marine province of Spain. It had an individual

standing in its relation to the crown quite as distinct as that of any one of our colonies before the declaration of independence. It was sometimes styled in granting decrees and other archives, "the Kingdom of New Mexico," although it was more frequently classed as a "province." (Hall, § 11.) Being a "distant province," its governor, commissioned directly by the king, was substantially a viceroy, disposing freely of the crown lands in the plenitude of his delegated power. His long used authority in this regard—never denied by the King—was confirmed by the royal cedula of 1754, which conceded vice-regal powers in the granting of crown lands to the governors of "distant provinces"; that is, provinces remote from the audiencias, etc. (*United States vs. Clarke*, 8 Pet., page 452.) Even any granting authority which he may have exercised in apparent disregard of this cedula or of any prior or subsequent laws or ordinances of the king must be deemed to have been exercised under secret instructions known to the king and him, although not to any subject. *Vide Strother vs. Lucas*, 12 Pet., page 438, where it is said:

> "Where the act done is contrary to the written order of the king, produced at the trial, without any explanation, it shall be presumed that the power has not been exceeded, that the act was done on the motives set out therein, and according to some order known to the king and his officers, though not to his subjects." Citing: 7 Pet. 96; 8 Pet. 447, 451, 454, 456.

Although the cedula of 1754 was, it seems, never repealed (Hall, § 188, note), and New Mexico was never fully under the jurisdiction of the audiencia of Guadalajara (*Ib.*, § 12), and was not included in the ordinance of the fourth of December, 1786,

establishing intendencias (*Ib.*, § 15), by which ordinance the cedula of 1754, so far as consistent, was expressly continued in force (*Ib.*, § 84), yet a certain general jurisdiction, military and civil, exercised by a "comandante general," was extended over New Mexico by the royal cedulas of 1776 and 1792 (*Ib.*, §§ 17, 18, 85), after which came the law of the cortes of the fourth of January, 1813 (under the constitution of 1812, *infra*), abrogated by Ferdinand VII, on his restoration in 1814, followed by the devolution of the administration of the public lands in "New Spain" on the treasury of the Indies by the resolution of the council of the Indies of the twenty-third of December, 1818, approved by the king (but apparently never promulgated in New Mexico, even if that "distant province" could be deemed a part of "New Spain"), and finally by the restoration in 1820 of the constitutional regime and laws of 1812 and 1813 (*Ib.*, § 109).

Amid the complications and uncertainties attending these specific innovations, coupled with royal cedulas, edicts and secret instructions which may never have been published, we are remitted to the law of presumption, as laid down in the Arredondo case and those that follow and emphasize its doctrines, in order to sustain the integrity of governmental acts of royal governors.

This law of presumption is emphatically redeclared by the court in *United States vs. Peralta*, 19 How. 343:

> "The appellants, *on whom the burden of proof is cast* to show want of authority, have produced no evidence, either documentary or historical, that the Spanish officers who usually acted as governors of the distant provinces of California were restricted in their powers, and could not make grants of land. The necessity for the

exercise of such a power by the governors, if the crown desired these distant provinces to be settled, is the greater, because of their distance from the source of power. By the royal order of August 22, 1776, the northern and northwestern provinces of Mexico were formed into a new and distinct organization, called the Internal Provinces of New Spain. This organization included California. It conferred ample powers—civil, military and political—on the commandant general. The archives of the former government also show that as early as 1786 the governors of California had authority from the commandant general to make grants, limiting the number of sitios which should be granted. In 1792 California was annexed to the vice-royalty of Mexico, and so continued till the Spanish authority ceased." [*Vide* Hall, §§ 17, 18, 186. New Mexico remained after 1792 as one of the provinces comprising "*las provincias internas.*"] "An attempt to trace the obscure history of the various decrees, orders and regulations of the Spanish government on this subject would be tedious and unprofitable. *It is sufficient for the case* that the archives of the Mexican government show that such power has been exercised by the governors under Spain, and *continued to be so exercised under Mexico*, and that such grants, made by the Spanish officers, have been confirmed and held valid by the Mexican authorities. Sola styles himself political and military governor of California. He continued to exercise the same powers after his adhesion to the Mexican government, under the provisions of the plan of Iguala and the twelfth section of the treaty of Cordova. The grant in fee, given by Sola, was after the revolution."

This elucidation of the subject by this court is significant as showing that, so far as it is important

to look to the specific legal source of our title, it can be supported as the valid act of the political chief, even if we are wrong in our opinion that the law of the cortes of the fourth of January, 1813, was one of the sources of the laws, usages and customs of New Mexico in 1825 *(infra)*.

New Mexico remained for centuries a remote dependency of an absolute monarch, and, from its isolation, the poverty of its surroundings, the paucity of the people and their simple-minded character, the besetting of savage Indians, with other difficulties attending communication with Mexico and Europe, the control of priests over souls and soldiers over bodies, it became to its inhabitants the world itself, and Spain appeared to them only the mystic seat of a dreaded power. Naturally, the governor, being the direct representative of the king — vested with the power of life and death, and even with full executive, legislative and judicial functions—was regarded as a vice-king, and the province as a kingdom.

While this despotic machinery was in full operation, the Napoleonic wars brought political commotion into the mother country, but, in New Mexico, produced no more effect at first than civil war in Mars. The old laws, customs and usages were still enforced and obeyed, and it could not be otherwise in the absence of due promulgation of authoritative innovations (Escriche, "*Promulgacion*").

Finally, news was brought to New Mexico and other provinces of a startling change in the government of Spain — the success of a revolution, the reorganization of the government with a cortes and a regency, the adoption of a constitution,—that of the eighteenth of March, 1812, and the promulgation of the land law of the fourth of January, 1813, and other reformatory statutes. This constitution and

this land law were congenial to the provincial character—they were flattering to villagers, shepherds and herdsmen imbued with peculiar reverence for official position. Thus, in a quiet, orderly way, came into being the "political chief," instead of the former governor, with the "provincial deputation" as a legislature. Even under the ancient despotism the "*Ayuntamiento*," or town council, had become known in the provinces (Escriche, "*Ayuntamiento*"), and this humbler form of deliberative assembly, composed in part of elected citizens, prepared the way for an elective legislature.

The constitution of 1812 and the decree of the cortes of the twenty-third of May, 1812, recognized the time honored institutions of the ayuntamientos, or town councils, and made specific regulations for their establishment and functions in all the provinces; and, under that constitution and the decree of the cortes of the ninth of October, 1812, the office of "constitutional alcalde" was recognized and regulated (Hall, § 127; 1 White, 416, 419).

It thus appears that the court below fell into an historical error when it assumed (*Transcript*, fol. 211) that, because the alcalde who executed the act of juridical possession styled himself the "constitutional alcalde," he intended thereby to recognize the Mexican "constitution" of 1824.

By the constitution of 1812 and the laws enacted thereunder, "political chiefs" were established to succeed the "governors" in the government of the provinces, and "provincial deputations" were also established as provincial legislatures, under the presidency of the political chiefs. (Hall, §§ 130, 132.)

In the provinces which were in close communication with Spain, such as Cuba, these provincial legislatures were speedily organized.

The law of the cortes of the fourth of January, 1813 (Hall, § 88 *et seq.*) was naturally very welcome to these constitutional provincial legislatures, because it was intended to vest them with large powers in the disposition of the public domain. By Article 1 it provided:

> "1. All the vacant and crown lands and municipal property (propios and arbitrios), with wooded lands and lands not wooded, as well on the peninsula and adjacent islands as in the provinces beyond the seas, except the ejidos necessary for the pueblos, shall be reduced to private property, taking care that in those of propios and arbitrios their annual incomes be supplied by the most opportune means, which, by the proposal of the respective provincial deputations, the cortes shall approve."

By Article 2 it provided:

> "2. In whatever manner the lands shall be distributed, it shall be in fee and with the right of inclosure, in order that their owners may enclose them (without prejudice to the sheep-walks (cañadas), cross-ways, watering places and services), and enjoy them freely and exclusively, and to destine them to the use or cultivation which may best suit them; but they cannot ever entail them, or pass them at any time in mortmain."

By Article 3 it provided:

> "3. In the alienation of said lands, the residents of the pueblos within the limits in which the lands [may] exist, and the common people (comuneros) in the enjoyment of said lands shall be preferred."

By Article 4 it provided:

> "4. The provincial deputations shall propose to the cortes by means of the regency the time and the terms on which it will be the most proper to carry into effect this provision, in their respective provinces, according to the circumstances of the country, and the lands which may be indispensable to preserve for the pueblos, in order that the cortes may resolve what may be most proper to each territory."

It will be observed that the foregoing provisions are generic and far sweeping, and indicate the purpose of confiding to the respective provincial deputations the general right of alienating the public lands, not only arable lands, but also pastural and mountainous lands, without restriction as to the extent of the grant to any grantee.

There follow three articles (6, 7 and 8) providing, "without prejudice to what is provided," for the reservation of "the half of the vacant and crown lands of the monarchy, excepting the ejidos," for the purpose of lucrative alienation, with a view to the payment of the national debt.

Only the provincial deputation is referred to in the foregoing provisions as the provincial authority concerned in the discretionary administration of the political trust thus intended, and that body was called on by the fourth article to suggest to the cortes the formal procedure appropriate to the execution of the trust reposed.

We are without data sufficient to show what plan of procedure was proposed to the cortes by any provincial deputation under these provisions, but it is to be presumed on familiar principles that the subsequent action of the respective deputations in the

effectuation of this law in their several jurisdictions was in harmony with some duly formulated plan of procedure sanctioned by the cortes, and even afterwards by the restored king, when, in 1820, he reestablished the constitutional régime of 1812 (Hall, § 109), as well as later by the general consent of all Mexican officials, and by settled usages and customs.

It seems essential to note that the subsequent articles—9, 10, 11, 12, 13, 15, etc.—relate exclusively to a minor subject, confided to the jurisdiction of the respective ayuntamientos or town councils, namely, that of granting arable tracts or "suertes" to meritorious soldiers and residents of pueblos, which jurisdiction did not extend to the large areas of pasture and woods committed by the first and second articles to the official administration of the provincial deputations.

It is evident from reading the law that only these small concessions of arable land—being, as stated in Article 18, "All the suertes which are conceded in conformity with Articles 9, 10, 12, 13 and 15"—were comprehended within the provisions of Article 17, viz:

> "The proceedings for these concessions shall be made also without any costs, by the ayuntamientos, and the provincial deputation shall approve them."

These regulations for the granting of "suertes" of arable land in the pueblos by their local officers were only declaratory of the old law (Hall, § 138), save that they subjected the action of the town council to the supervision of the provincial deputation (art. 17, *supra;* Hall, § 105), and, from the very terms of these regulations, they operated at once, without waiting for the "proposal" by the provin-

cial deputation mentioned in the fourth article. (Hall, § 92.)

It was these regulations respecting the grant to soldiers and other loyalists of "suertes" of arable town lands that were intended to reward and stimulate loyalty, the twelfth article providing:

> "The concessions of these suertes, which shall be called patriotic premiums, shall not be extended *now* to other individuals than those who may serve or have served in the present war, or in the pacification of the present turbulences, in any provinces beyond the sea." (Hall, § 100.)

While Hall says (§ 126) that "the law of the cortes of January, 1813, granting to soldiers the right to claim suertes of land in pueblos vested the power in the council to designate the lands to be given them, and also to execute all the proceedings relative thereto—that is, to make the titles for said lands," it is nevertheless true that the eleventh article of the law provided that "the expediente shall be remitted to the provincial deputation, in order that the latter may approve it and rectify any error."

It thus appears that this law of the fourth of January, 1813, served two purposes, namely, the general purpose of committing the alienation of the public domain in the provinces to the sole discretion of the respective provincial deputations, upon a plan of procedure to be formulated and proposed to the home government by each, and, secondly, the restriction of the ancient power of the ayuntamientos of granting "suertes" of arable town lands, by limiting its exercise, for the time being ("now," art. 12), to the cases of meritorious soldiers.

The grant of power to the provincial deputations was not made dependent on temporary exigencies,

but was the establishment of an abiding legislative authority consonant with the advanced ideas of constitutional government, which, generated in our country and France, were then gradually gaining a foothold in Spain. This innovation, so far from smelling of monarchy, was peculiarly adapted to the conditions of a popular form of government. No wonder that, in the very throes of revolution, the reforms introduced by the constitution of 1812 and the laws enacted for the effectuation of its provisions, and especially this law of the fourth of January, 1813, so far as its fundamental principle was concerned, found great favor in the Spanish provinces, and, once established there, continued in substantial vigor through all succeeding civil commotions until their final evolution into the "constitution" of 1836, and the establishment of governors and departmental assemblies thereunder.

The critical analysis of this law of the fourth of January, 1813, seems very necessary, in view of the *obiter dictum* of Mr. Justice NELSON in the case of *United States vs. Vallejo*, 1 Black, 541, which has, without further reasoning on the subject, been cited time and again in subsequent cases, although neither the Vallejo case, nor any of the others, required any examination of the law of 1813, since they were *all* cases originating in grants made subsequently, not only to the regulations of 1828, for the extension of the colonization law of 1824 over the territories, but also to the reorganization of the former provinces (already grown into actual or *quasi* "states" and "territories") under the "constitution" of 1836, by which the centralized government of Mexico was established, with "departments" and "departmental assemblies,"—and, for the most part, even subsequently to the military "Plan of Tacubaya" of the twenty-eighth of September, 1841 (Hall,

§ 670), the usurpatory "Bases Organicas" of the twelfth of June, 1843 (4 "Mexico," 499), and other equally grotesque manifestations of rightless might.

For instance, the two grants claimed by Vallejo were made respectively in 1843 and 1844, and those considered in the other cases following it were made for the most part on the eve of our war with Mexico, and therefore evoked jealous scrutiny.

Few of the considerations presented by us in advocacy of the Antonio Chaves grant had any place in the discussion of these later titles originating after the Mexican Republic had become settled under the "constitution" of 1836 and the later "bases" and projects of so-called government. Even before the Vallejo case, this court had held, in respect of the numerous grants purporting to have been issued on the very eve of the occupation of California by our forces, and bearing brands of fraud, forgery and other turpitude, on the part of Mexican officials and their confederates, that they were to be adjudicated upon the rules and principles furnished by the colonization law of 1824 and the regulations of 1828, and were also to be scrutinized with a jealous eye; for when once the suspicions of a court of equity are aroused in a litigation it becomes as indignant as outraged honor. *Vide* the distrust of one of Pio Pico's alleged grants expressed by the court, in *United States vs. Cambuston*, 20 How. 59, 64, as well as in several other cases.

Mr. Justice NELSON, referring in the Vallejo case (1 Black, page 553), to one of the grants which purported to be, not "in colonization," but a sale of public domain, made by the governor of California in 1844, said:

> "The ground taken to uphold this grant concedes that no other power has been conferred upon the governor by any

> express act of the Mexican congress; but it is insisted that the law of 1824, and regulations of 1828, did not repeal the power, if it previously existed, to make a grant of the public lands by sale for a pecuniary consideration; and the decree of the Spanish cortes of January, 1813, is referred to as confirming that authority. But anyone looking into this law will see that it provides for a very different system of disposing of these lands from that found in the Mexican law of 1824 and the regulations of 1828, and, unless specifically recognized or excepted, would necessarily be repealed as repugnant and inconsistent with the system adopted."

So far it is not material for us to question this opinion, although it was very seriously challenged in the dissenting opinions of Mr. Justice GRIER (1 Black, page 555) and Mr. Justice WAYNE (*Ib.* 558); for, as we shall show, the colonization law of 1824 was not in force in New Mexico in 1825, and probably not until some year later than 1828. The court thus holding that, after the promulgation of the regulations of 1828, the colonization law of 1824, with those regulations, became the exclusive law, repealing, by implication, all inconsistent prior laws, customs and usages, it was, of course, unnecessary to go into the question of the validity or scope of such prior laws in respect of titles (not before the court) originating before the year 1828. Nevertheless, Mr. Justice NELSON, *argumenti gratia*, proceeded to give his view of the law of the fourth of January, 1813, and, erroneously assuming that its provisions, relating to the grants of "suertes" of arable town lands by the municipal authorities of the towns, are its only provisions for the alienation of the public domain, and ignoring the very gist of the law — the provisions which cover the whole subject of crown

lands in the provinces, and look to their free alienation by the provincial deputations,—he says:

> "After providing for the reduction of the public lands to private ownership, in the way and with the qualifications stated, the act declares that half of the vacant and crown lands of the monarchy shall be reserved as a security for the payment of the national debt, and of those to whom the nation is indebted, who are inhabitants of villages to which the lands are adjacent, and provision is made for the distribution of them to the public creditors belonging to these villages; also for distribution to the officers and soldiers of the army; and then provides that the location of these tracts shall be made by a board of magistrates of the villages to which the lands are adjacent, and the proceedings are afterwards to be sent to the provincial deputation for approval. The law then provides for the grants of the residue of the vacant or crown lands to every inhabitant of the villages who asks for them for the purpose of cultivation, and has no land of his own. The patents are to be made by a board of magistrates free of charge, and the provincial delegation are to approve of them. The decree was to be published not only among all the people of the kingdom, but among the national armies, and in every way, so that it might come to the knowledge of all the subjects."

From this summary by the distinguished justice of the law as he read it, it is evident that he inferred that the power of granting all "the vacant and crown lands of the monarchy" (art. 6) was intended to be vested in the ayuntamientos, whereas, on more careful reading, it is seen that these municipal councils were authorized to deal only with such of the crown lands as lay within their respective jurisdic-

tions, and so to deal, not indiscriminately, but merely with selected tracts "most suited to cultivation." (Art. 9.) So far from it being the intention of the law to surrender to the ayuntamientos the great sovereign power of disposing at will of the entire public domain in their provinces, the tenth article limits the term "suerte" quite rigidly, declaring that "if it is possible, each suerte shall be such as, if regularly cultivated, shall be sufficient for the maintenance of one individual." Manifestly, the "suertes" contemplated as falling within the *jus disponendi* accorded to the ayuntamientos did not include the vast forests in the provincial mountains lying outside of the limits of the pueblos; and yet it appears by the first article that the provincial deputation, as the legislature of the entire province, in each case, was concerned in the disposition of "*all*" the public domain in the province, including the forests—"wooded lands and lands not wooded."

Influenced by this error in the interpretation of the statute, and giving undue importance to the provisions looking to the granting of "suertes" to soldiers concerned in advocating the cause of Spain, whether against France or against Mexican revolutionaries, the honorable justice then adverts to these provisions as tending to support a governmental policy adverse to that which inspired the revolution of the provinces which resulted in the overthrow of Spanish dominion there, and he says (*Ib.*, page 554):

> "Serious disturbances existed in the vice-royalty of Mexico at this time, arising out of revolutionary struggles headed by Hidalgo Morelos and Bravo. One of the objects of the law was to compensate and encourage the defenders of the mother country against these revolutionary movements."

Then, upon the false data assumed, and because especially of the mistaken assumption that by "rewards for patriotism" were intended, not comparatively small "suertes" of pueblo arable lands, but indefinitely large grants of the "vacant or crown lands of the monarchy," he adds:

> "Without pursuing the inquiry further, we think it quite clear that this law could not have been in force after the change of government, unless expressly recognized by the Mexican congress, and not then without being first essentially modified in its policy and purposes; and certainly, unless thus modified and the power in express terms conferred on the political chiefs of the territories to grant the public lands on sale, no such power can be derived from its provisions."

As applied to a province which had fully acknowledged the supremacy of Mexico as a republic, these deductions are irresistible, if they be limited to a denial of the pretensions of any political chief to grant the public domain without the consent of the provincial deputation, and a denial of the right of the ayuntamiento any further to grant "suertes" as rewards to persons who had opposed the revolution. It might also be well insisted that the revolutionary provinces, having finally become republican, were no longer affected by such of the provisions of the law as related to the application of the public domain to the payment of any part of the Spanish debt, or as attempted to subordinate their action to the authority of the home government. This opinion makes no allusion to the provincial deputation, except so far as that body was concerned in the capacity of supervisor of the action of the ayuntamiento, but we have seen that the provincial deputation, and neither

the political chief nor the ayuntamiento was made the prime mover and principal authority under the law.

The construction put upon the law in the provinces and the usages and customs which followed in its provincial administration must, at this late date and in view of the private titles which have resulted, be held conclusive by our own tribunals. The official functions employed by the provincial authorities were at once executive, legislative and judicial.

> "No court in the universe," says Chief Justice MARSHALL in *Elmendorf vs. Taylor*, 10 Wheat. 152, "which professed to be governed by principle would, we presume, undertake to say that the courts of Great Britain or France, or any other nation, had misunderstood their own statutes, and, therefore, erect itself into a tribunal to correct such misunderstandings."

Hancock vs. McKinney, 7 Tex., p. 442.

Hardeman vs. Herbert, 11 Tex., pp. 656-660.

Carazos vs. Trevino, 35 Tex., p. 165.

Every law student knows how "rules of property" have sprung from judicial misconstruction and official and popular errors. *Æquitas sequitur legem.* Nevertheless, through an early judicial error, dower in a trust estate was lost to a wife, while a right "by curtesy" in such an estate abided in a husband. (1 Perry on Trusts, § 323.) The books are full of the sanctification of blunders by well established custom and usage. (*Brevoort vs. Brevoort*, 70 N. Y., page 140.)

The grant to Clarke, considered by the court in *United States vs. Clarke*, 8 Pet. 436, was made by Governor Coppinger in 1816. In the

course of a summary of the various royal cedulas and other laws pertaining to Spanish grants, Chief Justice MARSHALL refers (*Ib.*, pages 454, 455) to the law of the fourth of January, 1813, and says: "This order was transmitted to the captain-general of the island of Cuba, but seems to have been repealed on the twenty-second of August, 1814." The facility of maritime communication between Spain and Cuba and the control exercised by the royal government over that island put the provincial officials there more directly and sympathetically *en rapport* with both the cortes and the king, as they successively exercised authority in the stormy days of the peninsular, than were the more distant provinces. Thus, the law of the fourth of January, 1813, was promulgated in Cuba within a few months after it had been decreed by the cortes and published by the regency, and we find that accordingly the provincial deputation in that province, with the presumed sanction of the cortes, proceeded to carry it into effect, construing and applying it in harmony with the construction for which we have above contended, and with the subsequent practice of the provincial authorities of New Mexico and other provinces. An illustration of the proceedings of the provincial deputation at Havana is found in the case of *United States vs. Delespine*, 15 Pet., page 329, etc., where the court says:

> "It appears that on the twenty-eighth day of May, 1813, Arrambide applied to the provincial deputation at Havana for two leagues of land to each point of the compass, making 92,160 acres; that, on the fourth of December, 1813, the deputation stated to the council of St. Augustine that it granted the land to Arrambide, and referred the grantee to the council with a command to expedite to him the title. The

> ordinary mode of granting lands in Florida had been directly, either by the captain-general of Cuba or the governor of Florida; but owing to a recent call of the cortes in Spain and a reorganization of the Spanish government existing at the date of the concession, and which state of things lasted only for a short time, the mode of proceeding in regard to granting the public domain was changed, and the powers vested in the tribunals known as the 'provincial deputations.' This appears by the royal order of the fourth of January, 1813, found in the United States Land Laws, Appendix, 1006. It was made the duty of the provincial deputations to devise the most convenient means of making grants; and, through the secretaries of state, to report the same to the cortes for their recognition and adoption. The deputation at Havana assumed the power to grant, and nothing appearing to the contrary of the existence of the power in that body, and the concession made at Havana not being opposed to the royal order of January, 1813, and there being no occasion in this case to inquire into the powers of the provincial deputation, we have treated the testimonial as emanating from the proper authority, leaving the point open for future inquiry, should an occasion call for it and positively require us to decide whether the deputation had the power assumed."

The court then proceeds to show that, in locating the grant to Arrambide, the council of St. Augustine, at his request, permitted him to abandon his first location, specified in the grant made by the provincial deputation, and select a separate and distinct tract of land situate sixty or seventy miles farther south than the one originally granted. The court thereupon held that the title claimed on this new

selection, without the privity of the provincial deputation, was void, and denied that the council *(ayuntamiento)* had any original power in the premises, saying (*Ib.*, page 334):

> "The council neither had, nor professed to have, in itself the power to make a new and independent grant to Arrambide, thereby disregarding the commands of its superiors, and of the laws and regulations recently adopted for the government of the provincial deputation when granting lands. The concession was therefore void for want of power in the tribunal that assumed to make it."

It will be further observed, on perusal of the statement of the facts appearing in the opinion, that the title failed to present even equitable features, since the land claimed had never been identified or reduced to actual possession. The court adds (*Ib.*, page 334):

> "The court say, in the case of the *United States vs. Clarke*, 8 Pet. 454-5, that the royal order of the fourth of January, 1813, founded on the decree of the cortes, seems to have been repealed on the twenty-second of August, 1814. That it was annulled by the king about that time there can be no doubt; and it may be that the title of Arrambide would not have been recognized by Spain after the repeal. So it may have been impossible for him to make the survey or return the proceedings to the deputation of Havana, according to any known law, after the repeal; that he had no time to do so between the twenty-second of March, 1814, when the council made the concession, and the twenty-second of August of that year, when the repeal took place, may be safely assumed; yet, with the very

slight information we have on this subject, and of those times in the history of Spain, it has been deemed proper not to institute an inquiry into the effect of the repeal of the royal order of 1813."

We are now brought to the proposition that, notwithstanding the repeal, in 1814, of the law of 1813, and notwithstanding the Mexican revolution and the successive steps taken by the Mexican provinces toward the final establishment of the republic on a settled basis, the government of New Mexico granted to Antonio Chaves a title to the lands in question which was complete at the date of the treaty and which has gathered dignity with the efflux of succeeding years. Promptly on the revocation of the law of 1813 by the restored king, in the next year succeeding, the fact was made known in Cuba and, accordingly, the provincial deputation there ceased to make grants of the public domain. Moreover, by reason of the abrogation of the Spanish constitution of 1812 and the laws which flowed from it, the provincial deputation and other constitutional authorities in that province passed away, and, obedient to the royal will, the ancient official machinery was again put in operation. Therefore, we find that grants, through the instrumentality of Cuban officials, made between 1814 and the restoration of the constitutional regime in 1820, emanated from the captain-general, or some official exercising similar functions, as in the case of the grant made to Clarke in 1816 by Governor Coppinger (8 Pet. 436). In the more remote and insignificant provinces, such as New Mexico, the promulgation of new Spanish laws was often delayed for obvious reasons. Besides, unlike the wealthy provinces, they were not the immediate objects of sovereign solicitude. Quite naturally, the history of the weaker and more indigent

provinces is obscure. Unattractive to the historian, they have furnished but slight additions to political literature. New Mexico, especially, has escaped critical attention, for she took no prominent place in the march of events. Although the Mexican revolution raged with more or less severity during a period of fourteen years prior to the *Acta Constitutiva*, history records no battles fought within her limits in the contest with the crown, or in factional warfare. During most of the bloody disturbances in the wealthy southern provinces, New Mexico seems to have led a life of peace, maintaining social order under her own usages and customs and the established form of government, with a Spanish governor exercising the chief executive, legislative and judicial power. But the persistent efforts of the revolutionaries in the lower provinces finally inspired the people of New Mexico with an increase of republican spirit, and gradually that province grew into a *quasi* autonomy independent of Spain. While but a few of the reforms intended by the constitution of 1812, and the accompanying constitutional laws, may have been established within the province until the restoration of the constitution in 1820, they must have had at least an educatory effect upon the inhabitants, as they were brought by rumor or otherwise to their attention; and, when, in 1820, the constitutional regime was revived in Spain, and the old constitutional laws of the cortes (including that of the fourth of January, 1813) were again put in force at home, they were gladly accepted by New Mexico, as well as the other provinces abroad. From that epoch, the form of *quasi*-republican government, provided alike by the Spanish constitution of 1812 and that of 1820, was firmly established in New Mexico. The province was governed by a political chief and a provincial deputation, and the law of the fourth of January, 1813,

was accepted, interpreted and enforced there. Thus arose a settled usage and custom in the granting of public lands which abided until long after 1825. Presumably the first constitutional political chief was appointed by the home government. But, even after the Spanish forces in the Mexican provinces had been finally overcome, and the provinces had become actually independent of the mother country, the same provincial form of government was kept up, by political momentum, not only in New Mexico, but also in every other province. The situation of each was in this respect quite analogous to that of each American colony at the date of our declaration of independence. The very theory of the genesis of political and social usages and customs assumes that their origin is obscure—often a mere matter of speculation; so that, while we believe that the law of the cortes of the fourth of January, 1813, was an energetic force in the generation of the provincial granting authority, we may also invoke the more ancient law, including the royal cedula of 1754, as explaining any part taken by the provincial executive (successor of the Spanish governor) in the same subject of administration.

A cursory examination of the progressive steps of the Mexican revolution after the restoration of the Spanish constitutional regime in 1820, will show that at the date of the Antonio Chaves grant (March 3, 1825), nothing had yet occurred to impair in any respect the jurisdiction of the local government of New Mexico over the public domain. On the contrary, it will appeár that the usages and customs of that province, in this respect, were in harmony with the political movements in the City of Mexico and with the *soi disant* "plans," "bases," projects and laws which were, from time to time, formulated and fulminated by soldiers, plotters, usurpers, reformers

and irregular assemblies in that and other cities of the central and southern provinces. Little or nothing of a *de jure* character is seen in the varying phases of assumed authority presented by Mexico during this period of social commotion. The only satisfactory legal solution of these imbroglios is found in the application of the rules of public law which relate to *de facto* governments and laws, and before even those rules can be logically applied it must appear that, by force or usage, the pretended governments and laws had attained importance by actual operation and recognition in the very jurisdiction in which they are invoked. A mere ideality in polities is not an authoritative power. It will also appear that, at the date of our grant, no authority, either *de jure* or *de facto*, was exercised in New Mexico, by any governmental power whatever, inconsistently with the exercise of governmental power by the political chief, provincial deputation, ayuntamientos, alcaldes and other officials of that province. We contend that these provincial functionaries acted *de jure*, but it is beyond contention that they acted at least *de facto*. In *Rhode Island vs. Massachusetts*, 12 Pet. 657, it was urged that the people inhabiting the territory in dispute between those states ought to have been made parties to the litigation between them concerning the state boundaries; but the court said (*Ib.*, page 749):

> "There are two principles of the law of nations which would protect them in their property: 1. That grants by a government, *de facto*, of parts of a disputed territory in its possession, are valid against the state which had the right. (12 Wheat. 600-1.) 2. That when a territory is acquired by treaty, cession or even conquest, the rights of the inhabitants to property are respected and sacred."

(Also *Pollard vs. Kibbe*, 14 Pet., at page 410, and *Texas vs. White*, 7 Wall., at pages 732, 733.)

Philosophically speaking, the sovereign standing of almost every government is rather *de facto* than *de jure*. Sovereign powers are assumed and exercised by the powerful, and the powerless acquiesce. Even our constitutional union was formed in spite of the resistance and protest of a large and intelligent minority. The genesis of every society seems to involve a growth which is logically the result of natural forces rather than of the pre-determination of its members. *L'homme propose, Dieu dispose.* The superiority of an existing fact in nature or society over any mere theory of its existence is seen in the respect paid by the common law to every office and other establishment that has for any serious length of time been operative as a social factor. This deference to established things is illustrated by the rule which sanctions as legal the acts of a *de facto* officer or official body. The same principle lies at the root of the autonomic existence of the several America colonies after the declaration of independence. Originally, these colonies were merely dependencies of the crown—political sub-divisions of the royal domain. Yet, because each colony possessed a formal governmental establishment, in whose powers none of the sister colonies participated, it was not unnatural that, after the revolution, each should assume, not only the exclusive right of its local government, but also the exclusive *jus disponendi* of the crown lands found within its territorial limits. During the formative period of the American Union there were many so far imbued with the ideas of a strong central government that they insisted that all outstanding unappropriated crown lands, wherever situate, within the respective colonial limits, should be deemed and treated as part of the

public domain of the Union. The wishes of such, in this respect, were to a great extent gratified by the surrender to the Union of the northwestern territory and other extensive tracts of land. Fortunately, the common sense of our people and the clear terms of our constitution, as well as the good order and the good faith which characterized the distribution of our social forces at the birth of our nation, have prevented any disastrous collision over the crown titles. Suppose, however, that, in the establishment of our national government, the policy of incorporating all public lands into the public domain of the Union and under its jurisdiction had prevailed; would not all private titles derived by citizens from the local governments within whose territorial limits the granted lands lay have been respected? Would not the fact that such titles had been granted by a government *quasi* autonomic holding possession and claiming the *jus disponendi* of the public lands within its jurisdiction have had great weight as matter of political equity? In such case, it would have readily been seen that the affected lands could in no wise be deemed to have been derived from the confederation, but that they had been wrested by the respective colonies from the British crown, and, on the same principle that each colony, after the revolution, could claim its own autonomy, it could also claim the crown lands as the necessary incident of such autonomy. A theory which should hold the crown lands of all the colonies to have become vested in the confederation by virtue of the revolution, would be necessarily destructive of the autonomic principle of colonial life.

The provinces of Mexico were held by the king of Spain by a title quite analogous to that by which the king of England held the colonial crown lands. Although the king of England had no viceroy, the

existence of the Spanish viceroy of New Spain does not militate against this analogy; for the viceroy was simply an *alter ego* of the king, and the Spanish provinces were no more consolidated because of his governmental supervision than they would have been had the king governed them directly, without his intervention.

Vide 1 Story, Constitution, §§ 227, 228.

The *de facto* element was very potent in our Union during the revolutionary war, and at the time of the adoption of the articles of confederation. Consequently, the usages of the colonial authorities in the exercise of public powers have always been respected, even when opposed to the theory of central sovereignty, under which it was contended by some that all vacant ungranted colonial lands became common lands of the Union.

[In the following summary of relevant events of the Mexican revolution, most of our references are made to Zarate's "La Guerra de la Independencia," which composes Tomo III of the work, published at Mexico and Barcelona (under the editorship of the historian Palacio), entitled "México á Través de Los Siglos," and to Olavarria y Ferrari's "México Independiente," which composes Tomo IV of that publication.]

While New Mexico was thus living quietly and in perfect good faith under the constitution of 1820 and the constitutional Spanish laws, as well as all applicable old laws, usages and customs, the fierce struggle which had been raging in New Spain proper, where nearly all the provinces had revolted, between the viceroy and the revolutionary generals came to a culmination. O'Donojú, the viceroy, was a constitutional monarchist, and owed his commission largely

to the influence of the American members of the Spanish cortes. (3 "México," 741.) Fearing that otherwise Spain might lose her Mexican possessions, he was willing to make peace on any terms consistent with the royal dignity. Iturbide, after serving the king for ten years in bloody and ruthless antagonism to the revolution, turned traitor and beguiling Guerrero, who was in command of a revolutionary army, joined with that general in the formulation of the "Plan of Iguala," which was proclaimed by Iturbide on the twenty-fourth of February, 1821. (3 "México," 675, 678.) Less than a fortnight before this date nearly all the deputies from New Spain were assembled at Vera Cruz, in order to take passage there for the mother country, where they were expected to attend the approaching cortes. Iturbide endeavored to persuade them to remain and open a congress under his new project of government, but very few consented, and nearly all sailed for Spain on the thirteenth of February. (3 "México," 676.)

The Plan of Iguala (3 "México," 678) was first proclaimed in a form more abbreviated than that in which it was sent by Iturbide to the viceroy, although not essentially different. Its articles embraced, among others, a declaration of the independence of New Spain, with further declarations to the effect that its government should be a moderate monarchy in substantial conformity to the Spanish constitution ("con arreglo á la constitucion peculiar y adaptable del reino"); that its emperor should be Ferdinand VII, but if he should fail to appear personally in Mexico and take the oath, then there should be invited in his place the infante Don Carlos, or Don Francisco de Paula, or the Archduke Carlos, or some other member of the reigning family deemed suitable by the congress contemplated by the plan;

that, until the meeting of the congress and in order to bring that about and to carry carry into effect the purposes of the plan, a "*Junta*" (assembly or board) to be called "*Gubernativa*" (governing) should be formed; that the junta should govern in the name of Ferdinand VII until his arrival and qualification, but treat as suspended all royal orders which might be issued by him meanwhile; that the congress ("*las cortes*") should determine whether to continue the junta or substitute therefor a regency pending the arrival of the person to be crowned; that in case Ferdinand VII should not consent to come to Mexico, the junta, or the substituted regency, should govern in the name of the nation, while the selection and coronation of the emperor should be pending; that the congress should establish the constitution of the Mexican Empire; that all inhabitants of New Spain should be citizens; that the person and property of every citizen should be protected by the government; that the junta should take care that all branches of the state should remain without any alteration whatever, and all functionaries—political, ecclesiastical, civil and military—just the same as they then were ("15. La Junta cuidará de que todos los ramos del Estado queden sin alteracion ninguna y todos los empleados politicos, eclesiásticos, civiles y militares, en el estado mismo en que existen en el dia"); that until the organization of the congress all criminal proceedings should be conducted in strict conformity with the Spanish constitution ("21. Interin las cortes se establecen, se procederá en los delitos con total arreglo á la constitución española"); and that, since the congress about to be convened had to be constituent (*constituyente*), it was necessary for the deputies to receive adequate powers in that behalf, and, since it was very important that the electors should know

that their representatives were to be for the congress of Mexico, and not that of Madrid, the junta should prescribe just rules for the elections and indicate the time for them, as well as for the opening of the congress.

This plan did not contain a word suggestive of Iturbide's secret ambition to gain the crown. On the twenty-fourth of August, 1821, however, when Iturbide and the viceroy O'Donojú, having come to terms mutually satisfactory, entered into the so-called Treaty of Cordova, on the basis of the Plan of Iguala, there appeared in the treaty a modification of the Plan by which Iturbide secretly and subtly prepared the way for reaching the throne, by providing that, in case Ferdinand VII and other members of his family, specifically named in the treaty, should refuse the crown, or not be acceptable, then it should be conferred on whomever the congress of the empire might designate ("el que las cortes del Imperio designen"). While this treaty confirmed substantially the Plan of Iguala, it made some modifications (3 "México," 739, 740). Among other changes, it styled the proposed junta "*Junta Provisional Gubernativa*," and altered its personnel, and it provided that the junta should have a president who might or might not be one of its members; that the junta should issue a manifesto to the public setting forth the purposes of its establishment and instructing the people regarding the proposed election of deputies to the congress; that, after the selection of its president, the junta should appoint a regency composed of three persons from within or without its own body; that the executive power should reside in the regency, and it should govern in the name of the monarch, "until he should grasp the sceptre of the empire"; that meantime the junta should govern in conformity with the *existing laws*, in everything not opposed to

the Plan of Iguala, and during the formation of the constitution by the congress ("XII. Instalada la Junta provisional gubernará interinamente conforme á las leyes vigentes en todo lo que no se oponga al Plan de Iguala, y mientras las Cortes formen la constitución del Estado"); that the regency should proceed to call the congress together according to the method determined by the junta, this being declared to be conformable to the spirit of article 24 of the said plan; and that the executive power should reside in the regency and the legislative in the congress; but that the junta, until the meeting of the congress, should exercise the legislative power in urgent cases, acting in accord with the regency, and also act as an auxiliary and consulting body for the latter.

Always stimulated by his kingly ambition, Iturbide, afterwards, nominated as "La *Junta provisional gubernativa*" thirty-eight favorites, all of whom were either noblemen or affiliated with the aristocracy (4 "México," 11), although urged by a friend to invite the co-operation of the provincial deputations in fixing the personnel of the junta (*Ib.* 13). Having organized and proclaimed the junta, on the twenty-eighth of September, 1821, with Iturbide as its president, he and the other members of that body signed and promulgated on that day the declaration of independence of the Mexican Empire ("Acta de Independencia del Imperio Mexicano"), which, in so many words, professed conformity with the principles laid down in the Plan of Iguala and the Treaty of Cordova ("con arreglo á las bases que en el Plan de Iguala y tratados de Córdoba estableció sabiamente el primer jefe del ejército imperial de las tres garantias"). *Ib.*, page 17.

This declaration of independence, limited as was its scope, was received with favor in nearly all the

provinces, although some dissented and insisted on maintaining their respective autonomies. Such is the ground on which it is not unusual to fix the date of Mexican "independence" as the twenty-eighth of September, 1821.

In pretended pursuance of the Plan of Iguala and the Treaty of Cordova, and under the "Acta de Independencia," based on those instruments, the junta proceeded to call a congress of deputies from the several provinces as well as to make provisional and arbitrary selection of persons to act in the place of absent deputies or in the name of provinces that might fail to hold elections; and it organized a regency with Iturbide at the head.

Some of the provincial elections of deputies were held according to the provisions of the Spanish constitution of 1820, and others according to the terms of the call of the junta and regency, but, notwithstanding these and other irregularities, the congress contemplated by the Plan of Iguala and the Treaty of Cordova convened and organized in the city of Mexico on the twenty-fourth of February, 1822. (*Ib.*, pages 52, 53, 55.)

It was soon made manifest that this body, called to make a constitution, was, in spite of the stormy opposition of a large minority, many of whom were arbitrarily jailed by Iturbide, turned into his willing tool. It failed to propose a constitution, but it succeeded, by an illegal vote, in declaring Iturbide hereditary emperor of the "Mexican Empire." (4 "México," 77.) Accordingly, he was crowned on the twenty-first of July, 1822. All this occasioned the express protests of several provinces, by their political chiefs, provincial deputations, and ayuntamientos, as in the case of Nuevo Santander. (*Ib.* 83.) For three months, Iturbide sought to overawe the congress, while that body resented his inter-

ference, and then, by his unlawful decree of the thirty-first of October, 1822, as well as by force, he dissolved and dispersed it. (*Ib.* 85.)

Thereupon, Iturbide, without any pretense of constitutional or statutory right, created a new junta, called *La Junta instituyente*, to take the place of the junta which had ceased to exist on the organization of the congress, and selected as its members two persons as deputies for each of some of the provinces and one as deputy for each of the others. (*Ib.* 85.) In consequence of these tyrannical proceedings on the part of Iturbide, new disturbances arose in many of the provinces, and, on the sixth of December, 1822, General Santa Anna, who had abandoned Iturbide and, entering Vera Cruz, gained over its garrison, there formulated and proclaimed the "Plan of Vera Cruz," declaring, among other things, that citizens should enjoy their respective rights of persons and property in conformity with the [Spanish] constitution and the laws; that the governmental functionaries should continue in their offices and faculties. ("Los ramos del estado quederán sin variación alguna, y todos los empleados politicos, civiles y militares se conservarán en sus empleos y destinos, menos los que se opongan al actual sistema, pues á estos con conocimiento de causa se les suspenderá hasta la resolución del congreso"); that civil and criminal causes should proceed according to the Spanish constitution and the existing laws and decrees promulgated up to the time of the audacious extinction of the congress ("En las causes civiles y criminales procederan los jueces con arreglo á la constitution española, leyes y decretos vigentes expedidos hasta la temeraria extincion del congreso en todo aquello que no se oponga á la verdadera libertad de la patria"); that certain provisions proclaimed on the 2nd inst. by Santa Anna, on consultation with

the provincial deputation of Vera Cruz, should be observed; and that the provisions of the "Plan" should be without prejudice to the faculties of the sovereign congress ("las altas facultades del soberano congreso") in which the power to modify them was thereby expressly acknowledged (4 "México," 86, 87).

Echávarri and the other imperial generals, engaged in the siege of Vera Cruz against Santa Anna, combined with him, on the first of February, 1823, in the formulation of still another government project —called the "Acta de Casa Mata"—wherein, among other things, it was declared that, the sovereignty residing in the nation, the congress should be installed in the shortest possible time, upon the same basis first prescribed ("bajo las bases prescritas para las primeras"); that, since some of the deputies to the dissolved congress were, by reason of their liberal ideas and strength of character, worthy of public esteem, while others had lost the public confidence, the provinces should be at liberty to re-elect the former and to substitute more suitable persons in place of the latter; that, pending an understanding between the supreme government and the army, the provincial deputation of Vera Cruz might exercise administrative faculties; and that the army should be stationed in the cities and wherever emergencies might require, support the congress in its deliberations, and not disband, except on the order of that body. (*Ib.* 88, 89.)

This plan, with its formidable military support, and its acceptance in many provinces, finally compelled Iturbide to issue a decree on the fourth of March, 1823, recalling the deputies for the reconvention of the congress, and, in consequence, a *soi disant* session of that body opened on the seventh of the same month, although, owing to the absence of

distrustful deputies, a legal quorum had not yet gathered. (*Ib.* 90, 91.) Before this body, Iturbide tendered his abdication as emperor on the twentieth of March, 1823, although by its terms he reserved the supreme authority with liberty to delegate its exercise to persons worthy of the confidence of the congress, until it should pass upon the abdication. Before making a final disposition of the question of abdication, the so-called congress undertook to appoint a provisional government called the "Poder Ejecutivo," composed of Bravo, Victoria and Negrete, of whom the first two were absent, their places being supplied temporarily by Michelena and Dominguez. On the seventh of April following, the congress declared, among other things, that the coronation of Iturbide was an act of violence and was null; that all resulting acts were illegal and subject to confirmation by the "existing government"—*actual gobierno;* that the supreme executive power should promote the speedy departure of Iturbide from the national territory; and that there never was any right to subject the Mexican nation to any law or treaty, except such right as lay in the nation itself, or its elected representatives, according to the public law of free nations; and, in consequence, the congress considered the Plan of Iguala and the Treaty of Cordova as non-existent, and that it remained absolutely at liberty to adopt that form of government which it should deem suitable. (*Ib.* 93, 94.)

The recklessness and absurdity of these declarations are abundantly pointed out by Olavarria. (*Ib.* 94, 95.) We thus find that a congress founded on the Plan of Iguala and the Treaty of Cordova, and elected for the express delegated purpose of forming a constitutional monarchy accordingly, actually assumed to destroy the very foundations of its legal existence, and, by tyrannical usurpation, to reform

the government on an entirely inconsistent theory. Such acts bear only a *de facto* character, and could not *per se* override the existing *de jure et de facto* legal establishments, laws, usages and customs of the provinces. It is evident that the executive government—"Poder Ejecutivo"—born of such usurpation possessed no *de jure* authority whatever.

No wonder that temporary anarchy followed, and that many provinces,—*quasi*-autonomies, with their political chiefs, provincial deputations, ayuntamientos and other official authorities—such as Guanajuato, Morelia, San Luis Potosi, Zacatecas, Oaxaca, Texas, Coahuila, Nuevo Leon and Tamaulipas, as well as others in Central America, openly asserted themselves against the lawless proceedings of the alleged congress and "executive power." (*Ib.* 98, 99.)

On the twenty-first of May, 1823, the "congress" decreed a call upon the provinces to elect deputies to a new constituent congress, upon a plan of election which met with general favor among the people in the provinces, although some of the provinces still resisted all the measures emanating from the capital. (*Ib.* 99.) This new scheme involved the formulation of proposed bases of government on which the new deputies were expected to act in the adoption of a federal constitution, and these bases, printed in circulars, were published among the electors. They embraced substantially the provisions which the new constituent congress, which convened on the seventh of November, 1823, adopted as the *Acta Constitutiva*. (*Ib.* 99.) The fifth article declared that the form of government should be republican, representative, popular and federal; and the sixth article declared that "its integral parts are *sovereign and independent states* in all that relates exclusively to its *internal administration and government*, as detailed in this act and in the general constitution." (*Ib.* 99.)

The constituent congress thus called was, in effect, a constitutional convention. The provinces elected their deputies on the express understanding that all were on an equal footing, and that each, either by itself, or in combination with contiguous provinces, should become a "free sovereign and independent state." New Mexico was represented in the convention on this well understood plan. Even after the convention had been in session for upwards of two months, the "Acta Constitutiva," signed by the deputies on the thirty-first of January, 1824, declared (in its sixth article) not only that the integral parts of the nation were "free, sovereign and independent states," but (in the seventh article) that among the "states at present comprising the federation" was "the internal state of the north containing the provinces of Chihuahua, Durango and *New Mexico*." (1 *White*, 375.)

In these circumstances, it is impossible for a constitutional lawyer, bred under our system, to understand on what pretense the convention or congress, by its decree of the sixth of July, 1824, assumed to declare New Mexico a "territory."

("Legislacion Mexicana" de Manuel Duolan y José Maria Lozano; Edicion oficial; Mexico, 1876; Tomo II, pp. 709-10.)

If we regard the *Acta Constitutiva* as a provisional constitution serving the purpose of a basis of temporary government until the adoption of the federal constitution, then in contemplation, and its due promulgation, and further attribute to the constituent congress, which enacted the Acta Constitutiva on the thirty-first of January, 1824, the right to legislate consistently with that enactment until the new constitutional congress should come into being, still it is plain that it had no constitutional power to declare New Mexico a territory.

1. The province of New Mexico was by article 7 of the Acta Constitutiva (1 White, 375), put in the list of the "free, sovereign and independent states."

2. The only territories provided for were the Californias and the greater part of the district of Colima. (*Ib.*, art. 7.)

3. By article 8 (*Ib.*) it was provided: "The *constitution* may increase the number of states mentioned in the preceding article, and modify them as it may deem most conducive to the happiness of the people." This gave no power to the congress to destroy or degrade any state.

4. By article 34 (*Ib.*) it was provided: "The general constitution and this act guarantee to the states of the Union the form of government adopted by this law, and each state assumes likewise the obligation of sustaining the federal Union at every sacrifice."

Of course this article embraced New Mexico.

5. By article 35 (*Ib.*) it was provided: "This act can only be changed within the time and in the manner expressed in the *general constitution*."

The act being a constitutive one, of the nature of a constitution, this article, as well as article 34, was unrepealable by the mere congress.

6. Therefore, the congress could not constitutionally repeal or amend article 7 by which New Mexico was given her status as part of the internal state of the north, and, consequently, the decree of the sixth of July, 1824, declaring her to be a territory, was unconstitutional.

On the eighteenth of August, 1824, this same constituent congress, or convention, assumed the power to enact the familiar colonization law.

The "bases," suggested and published by the former so-called congress, which passed out of being on the thirtieth of October, 1823 (4 "México," 101), and the *Acta Constitutiva*, decreed on the thirty-first of January, 1824, declared (*Acta Constitutiva*, art. 10; 1 *White*, 376) that "the legislative power of the federation resides in a chamber of deputies and a senate," and (*Ib.*, art. 11) that "the members of the chamber of deputies and of the senate shall be named by the states in the manner prescribed by the constitution."

It seems to us that these constitutive declarations looking to the adoption of the constitution, which took place on the fourth of October, 1824, necessarily left the enactment of all general laws, save provisions indispensable to the exigencies of the convention itself, to the constitutional legislative power, when it should have come into existence.

Neither the Acta Constitutiva, nor the constitution of 1824, contains a word on the subject of the disposition of the public lands in the states and territories. We suggest that, but for the subsequent practical interpretation of the colonization law by the state and territorial tribunals and officials of Mexico, it might well be held that the colonization law was void in its inception, and could not gain validity except by constitutional or legislative ratification.

A law so vicious in its origin as the colonization law is only *de facto* legislation in its embryotic state, and it could not become in the slightest degree respectable, until after, first, perfect promulgation, and, secondly, actual acceptance and application in the jurisdictions affected. Indeed, according to our ideas and procedure in the enactment of federal and state constitutional provisions, they do not become

operative until finally ratified by the sovereign people concerned.

During this nebular and chaotic period of Mexican history, the laws ("*leges vigentes*"), usages and customs which were incorporated, as vital and energetic factors, in the official and social system of New Mexico and other provinces, abided in active vigor, and many private titles, including that of Antonio Chaves, accrued under them. He that seeks to impeach them as emanating from unlawful authority is called on to prove clearly the truth of his accusation (19 How. 343, *supra*).

The disorderly, inconsistent and arbitrary proceedings thus apparent in the Mexican political movements kept even our government, then so full of sympathy with the aspirations of men to freedom, from giving recognition to any of the contending factions until a late day. Even after the installation of Iturbide as emperor, John Quincy Adams, our secretary of state, after due and friendly inquiry, could not advise the executive to recognize the Mexican Empire.

It was not until the eighth of March, 1825, that we accredited a minister to the Republic of Mexico. Even while the wild and reckless congress of 1823 was in session in Mexico, the Spanish cortes, with the American deputies, who made a part of it, was in session in Madrid.

There never was a time prior to the granting of the Antonio Chaves title, or long afterwards, when even a hint was given by legislation or executive order in denial or in disparagement of the granting functions exercised by the provincial deputation of New Mexico, with or without the concurrence of the political chief. All through the stormy, perilous times, from the Plan of Iguala to the adoption of

the "constitution" of 1836, the provincial deputations and political chiefs were recognized, first by implication and later by express decree, as the governing forces in the provinces which had at last evolved into "territories." The Acta Constitutiva, which placed New Mexico in the category of "states," out of which no attempt to displace her was made until the unlawful decree of the sixth of July, 1824 (1 "*Legislacion Mexicana*," *supra*, pages 609, 610), declares (art. 25; 1 White, 379) that "the legislatures of the different states may provisionally organize an *internal government and in the meantime they must see that the laws actually in force be observed.*" We have seen that usages and customs, ancient or recent, formed part of these laws. The Plan of Iguala (art. 13, art. 15; 3 "México," 679) and the Treaty of Cordova (art. 12; 3 "México, 740), as well as others of the numerous governmental projects (*Plan of Vera Cruz*, art. 9; 3 "México," 87; *Acta de Casa Mata*, art. 5; *Ib.* 88), showed equal solicitude for the preservation of the old laws and official powers. *Vide, etiam*, page 448, chapter XVII of 1 "Legislacion Mexicana," *supra*, showing the provision of the Spanish law under the constitution of 1812, for continuing the old laws, and, *Ib.*, page 422, the provision made June 23, 1813, for the promulgation of laws in the provinces by the political chiefs. The law of the cortes of the fourth of January, 1813, relating to the alienation of the public domain, *supra*, was included as among the "*leyes vigentes*" or laws in force, in a work ("*Leyes Vigentes*," page 58,) published in the City of Mexico in 1829. (*Cohas vs. Raisin*, 3 Cal. 443, 447; also citation by Mr. Justice Wayne in the Vallejo case, 1 Black, pages 561, 562) Indeed, everywhere we look in the political literature of Mexico, as well as in the practical exposition and application of the accepted law of the land by the

tribunals established in the provinces, we find plain traces of the extancy of these old laws and of the usages and customs which attended them.

To sanction now a new and strange construction of the Mexican system of jurisprudence and political administration, and thereby overthrow old titles sanctified by time, good faith and unchallenged enjoyment for scores of years, would be an anomaly in the judicial interpretation of treaty obligations and in the judicial application of the "principles of public law." Every country regards as the highest evidence of legal right a settled claim of right accompanied with actual long continued enjoyment, sanctioned by the tribunals and other authorities having jurisdiction to question the claim if unfounded.

Hence, as we have seen, judicial errors in the exposition of the law grow into "rules of property." Even popular errors in the construction of statutes become ultimately the accepted law. *Communis error facit jus.* The statute of uses was construed so as to defeat its very letter and intent. The old statutes of limitations and of frauds were substantially amended by judicial construction and by usage. In defiance of the true intent of the several organic acts, the territories have for fifty years usurped the right to displace the stern law of murder declared by the Crimes Act of 1790, by milder local provisions (*Vide* argument of counsel in the Yarberry case, 2 New Mexico, page 397 *et seq.*), and usage has given sanction in the courts to this legislative usurpation. At the time of the Dred Scott decision, no one would have imagined that the organic acts of New Mexico and Utah were intended, by authorizing an appeal to this court directly from a district judge, at chambers, in a matter of *habeas corpus* "involving the question of personal freedom," to confer on the appellate tribunal any authority, except to determine whether

the detained person was a freeman or a slave. Yet, usage appears to have settled the law otherwise. (*Vide*, 11th point (page 45) of Appellee's brief filed in the *Delgado* case, 140 U. S. 586.) Even a printer's blunder in the publication of an old statute has led to a false construction which the courts have upheld on grounds of public convenience. (*Pease vs. Peck*, 18 How. 595.) Municipal bonds have been held to be constitutionally binding contracts, or the contrary, accordingly as they have conformed or not to the adjudications of the state courts extant at the time of their issue, although, being afterwards deemed unsound, such adjudications were finally overruled. (*Douglass vs. Pike County*, 101 U. S. 677, 686, 687.)

Precedents without limit might be furnished to show the conclusive import of the practical interpretation of law, statutory and otherwise, by those concerned officially in its exposition and enforcement, as well as by the public at large. (*Vide*, SECOND POINT, *supra.*) So that we may well assume that the authority under which Antonio Chaves derived his title was the authority understood, acknowledged and forceful in the place and at the time in which it was granted.

If we should cede back a part of Arizona to Mexico, we would not tolerate such criticism by Mexico of our statutes and the action of our land office and judiciary, in their construction in respect of private land claims, as would be equivalent to the forensic dilettanteism which at this late date urges upon our tribunals, vested with a "benign jurisdiction" in the administration of a treaty, to put a jealous political and judicial microscope, and even X ray scrutiny, upon a Mexican title generated in a darker day, without the aid of a Land Court or a Roentgen. Nor must it be forgotten that titles in

New Mexico, granted in 1825, under the old laws, usages and customs then in operation, are in no respect analogous to titles to public lands attempted to be granted under those laws, usages and customs, after such lands had been acquired by our government by conquest or by cession. The *quasi*-autonomy accorded to the respective provinces by the Spanish constitution of 1812, revived in 1820, developed in greater energy by reason of the course of revolutionary events, and, upon the separation of the provinces from the mother country, each took, as a forced inheritance, its crown lands, laws, usages and customs, precisely as each of our colonies took the like on the assertion of their independence. None of the laws were of the nature of foreign laws. They continued to be adapted in general to the new situation, as they had been to the old. Even the mining laws remained in force, as is evident from the subsequent congressional decree of the seventh of October, 1823 (*Schmidt's Civil Laws, App. No. IV*). New Mexico was never conquered; nor was she ever bought by Mexico. Of her own free will, invited to become "a free, sovereign and independent state," she sanctioned her representation in the constituent congress. Since her representative could not consent to degrade her into a "territory," nor to surrender her dominion over her public lands to the proposed confederacy, she never became a "territory," until she accepted the constitution of 1824, by which her status was so defined. She did not accept that constitution until she sent her deputy to the first Mexican congress convened under that instrument. Under article 16 of the constitution of the fourth of October, 1824, which was not promulgated until the lapse of a considerable time after that date, the elections for the first constitutional congress could not occur until October, 1825, or some other

month in the autumn of that year. The constituent congress was not finally dissolved until the twenty-fourth of December, 1825, and the first constitutional congress was not organized until about nine months after the date of our grant. (4 "México," 129; Cons., art. 16 and art. 67; 1 White, 389, 397.) Although the Mexican constitution of 1824 may have been, as said by its enemies, a bad mixture of the American and French constitutions, it is impossible to find in it a single word suggesting the destruction of the *quasi*-autonomy of New Mexico. A "territory" of more than forty thousand inhabitants could send to the congress a deputy who had equal "voice and vote in the formation of all laws and decrees" with any state deputy (Cons., art. 14), and the states could select only one deputy for every eighty thousand inhabitants or every fraction exceeding forty thousand (*Ib.*, art. 11). The chief serious disparity appears in the fact that only the states could elect senators. The constitution (*Ib.*, art. 137, subd. 1) conceded the right of the states, as such, to make concessions of land, since it provided for the jurisdiction by the Supreme court of litigation "between individuals in relation to lands, under concessions from different states." So far as the terms of the constitution were concerned, the policy as to the territories was negative—one of *laisser faire*.

There being nothing in the Acta Constitutiva of the thirty-first of January, 1824, or in the constitution which followed it, indicating any purpose to change the jurisdiction of any old province over its public lands, they imported no more on the subject than did our own articles of confederation on the kindred subject of crown lands in the colonies. Presumptively, then, the dominion over the provincial public lands remained vested in the respective

provinces (whether called states or territories) as before, according to the principles of public law; and, since no alteration had yet been suggested in the form of government of any province styled a "territory" by the constitution, the old form of government, by a political chief, deputation, etc., continued.

Manifestly, the colonization law attempted to be passed on the eighteenth of August, 1824, could not be presumed to be binding on any province that was not legitimately privy to its enactment, for it did not come within the purview of the call for the constitutional convention or *congreso constituyente*. Recently emancipated from a despotism, the provinces were naturally more deferential to arrogant authority, although illegitimate, than the free men of the north would have been under like oppression, and consequently the new born states gradually accepted the colonization law after its promulgation, although it might well be suggested that they were under no obligation to do so.

Tornel, in his Reseña Histórica, p. 147, says that the restrictions of the colonization law were never observed *(jamas fueron observadas)* by the states, and he calls attention to what he characterizes "the exaggeration of the badly interpreted principle of the sovereignty of the states." (4 "México," 135.)

New Mexico could not possibly be bound by the colonization law of 1824, unless by her own ratification:

1. The constitutional convention, called to form a government, could not *mero motu* divest New Mexico of her old *jus disponendi* of her public domain.

2. The "Mexican Empire" was extinct and repudiated and all its legislative proceedings annulled. Besides, while it existed as a *de facto* government, it

did not even attempt to revoke the powers of the provincial deputations, but, on the contrary, acknowledged "*las leyes vigentes.*"

3. The congress which, after installing Iturbide as emperor, was arbitrarily dispersed by him and finally reconvened, did nothing even pretending to impair the old provincial right of disposition of public lands.

4. The deputy for New Mexico elected by that province, either severally or in conjunction with the other members of the "internal state of the north," to the constitutional convention, under the project which expressly contemplated her inclusion in the list of "free, sovereign and independent states," had not a shadow of legal right, express or implied, to consent to her degradation into a mere "territory," by the decree of the sixth of July, 1824; nor, by the colonization law of the eighteenth of August, 1824, to consent to put her public lands under the control and disposition of the proposed confederacy.

5. Neither the Acta Constitutiva, nor the constitution of 1824, assumed to ratify all the proceedings of the constitutional convention, nor, specifically, the colonization law, which, from its very nature, was a premature statute and ought to have been postponed for consideration by the contemplated constitutional legislature.

In fact, New Mexico had not done or consented to anything equivalent to a ratification of the colonization law as early as the date of our grant, the third of March, 1825:

1. Although, by its terms, the colonization law went into effect in the several constitutional "states" immediately on its promulgation within their respective limits, and the states, by accepting its provisions and acting upon them, waived all objection to the

law, so far as their acquiescent legislatures could be deemed qualified to exercise so high a power in the absence of authority under state constitutions adopted with the consent of their electors, still, the law did not, even by its terms, become operative in New Mexico, until, by means of executive action, the "government" should provide for the colonization of the territories under its "principles," as well as duly promulgate the law and all regulations.

2. At the date of the colonization law, the "Executive Power," a triumvirate composed of Bravo, Victorio and Negrete, was the arbitrarily appointed executive authority of Mexico, and this alleged authority was not succeeded by the first constitutional president of the republic until the tenth of October, 1824 (4 "México," 116). Neither of these executive authorities, non-constitutional or constitutional, framed any regulations under the colonization law, for extension of its "principles" into the territories, until the twenty-first of November, 1828 (*Hall*, § 487).

3. The lapse of upwards of four years, from the date of the passage of this pretended law to the twenty-first of November, 1828, during all of which period the provincial or territorial deputation, with or without the concurrence of the political chief, continued without question and with general acquiescence to exercise its old functions in the making of grants of public lands, is significant of the existence of a legal doubt as to the validity of the law itself, and it is equally significant of the sanction given by all authorities, federal and territorial, to the practices of the territorial functionaries in that regard.

Moreover, the colonization law was primarily designed to encourage foreign emigration into the "territories," as well as emigration from the more populous parts of Mexico to the sparsely populated

parts, and it did not profess to repeal or impair existing local granting functions. Nor, as we have shown, could it, in the circumstances attending its origin, have an abrogatory effect by implication, or even by express words, until afterwards duly sanctioned by the provinces affected. The fourth regulation of 1828 seems to treat the colonization law as non-exclusive of other laws, since it enjoins on the political chief to make or refuse grants "in strict conformity with the *law applicable* to the matter, *especially* with *that* of the eighteenth of August, 1824, already cited."

At all events, even if we adopt for the sake of argument the extravagant assumption that the law was valid in its inception, it could not operate in New Mexico until after its due promulgation. No attempt to promulgate it was made before the twenty-first of November, 1828, the date of the regulations, and it is very doubtful whether it was actually promulgated there until a considerable delay thereafter. Since no intent or purpose (or, we believe, right) existed to interfere with the customary granting powers of the local authorities, and they were acting with wisdom and fairness, there was no occasion to be precipitate in the promulgation. The law was not promulgated in the territory of Lower California until the twenty-fifth of February, 1830, and up to that time that local government, under its customs, granted lands by virtue of a special order of the Spanish visitor, Count de José de Galvez, made for that province on the twelfth of August, 1768 (*Hall*, § 213), as well as under its ancient powers (19 How. 343, *supra*). The failure of the authorities in New Mexico to take any notice of this pretended innovation in the making of grants prior to 1828, or to some later date, and the habitual granting of lands by them in the interim, under

their well settled customary powers, are strong evidence of the non-promulgation of any contrary law. (*Gonzales vs. Ross*, 120 U. S., page 605, *supra; vide etiam*, 19 How. 343, *supra.*)

Promulgation in all civil law countries, and especially in Spain and her dependencies, and the nations derived therefrom, has always been a very formal and serious proceeding, whose due occurrence was a condition precedent to the operation of a new law. (Escriche, "*Promulgacion;*" 120 U. S., page 105, *supra.*) The same principle is, indeed, found in our common law in its application to the orders of the king of England, in council, relating to the government of his colonies. Such orders, whether original statutes or repealing statutes, did not bind the colonial authorities until due "notification," *i. e.*, promulgation.

Albertson vs. Robeson, 1 Dallas, 9.

This case is cited by YEATES, J., in *Morgan vs. Stell*, 5 Binn. 318, where, in giving a more full statement of the facts, he said: "I well recollect that the decision gave general satisfaction to the profession."

It is also cited in *People vs. Trinity Church*, 22 N. Y., page 50.

Even admitting that, in the course of events subsequent to 1825 tending to bring about general acquiesence in the assumption by the republic of ownership of the vacant public lands in the former provinces, it resulted that the Mexican states and territories thereafter lost even the right to challenge the government's claim; nevertheless, the "principles of public law" demanded the maintenance of private titles, already accrued in good faith under the then unquestioned local administration, and always maintained by a long and unmolested claim

and possession. It is no answer to this proposition, to say, as does the court below, that the constitution of 1824 was in force in New Mexico in March, 1825 (*Transcript*, fol. 211), although, from the nature of that constitution — its provisions denying to New Mexico her promised standing as a "free, sovereign and independent" state—it may well be contended that it could not operate in New Mexico until fully accepted by unequivocal acts; because there was no provision therein upon the subject of public lands, or destructive of existing provincial powers over them. Powers not delegated to the general government might well be deemed reserved by its provincial factors. The disposition of public lands was internal or "interior" business, as it is under our government, where we have a "department of the interior" chiefly concerned in the administration of the public domain; and, as we have seen, the Acta Constitutiva, in reference to New Mexico, as well as the other provinces proposed as states of the confederacy, declared (art. 6; 1 White, 375) that the integral parts of the nation "are free, sovereign and independent states, in as far as regards exclusively *its internal administration*," etc.

While this argument has been in course of printing we have had access to the treatise of Hon. Matthew G. Reynolds, one of the counsel for the government, referred to by the court in the Chaves case, *supra* (159 U. S., page 458), and containing a very useful compilation of many Spanish and Mexican laws, decrees, etc. In one or two places, however, we detect a perturbation of the historical spirit by forensic zeal. For instance, on page 41, after mentioning the unconstitutional and preposterous decrees of Santa Anna of the twenty-fifth of November, 1853 (*Ib.*, page 324) on the eve of his dictatorship, and of the seventh of July, 1854 (*Ib.*, page

326), when he was in the pretended exercise of that usurped authority, by the first of which, in the desire to levy political blackmail, he assumed to disavow all grants made in the states and territories without express authority from the general government, and to compel a revision of all titles claimed since September, 1821, although by the sixth article of the decree of the seventh of July, 1854, he did concede that grants in colonization were valid—the author of the treatise exalts that sinister tyrant as a Mexican Lycurgus. Yet Santa Anna was no more fitted to advise a Taney or a Grier in jurisprudence than to advise a Taylor or a Scott in strategy; and his arbitrary decrees fulminated upwards of five years after our treaty are not precedents of any persuasiveness whatever.

But these edicts of Santa Anna are well offset by those of the other "law-maker," President Alvarez, who, by his decree of the third of December, 1855 (*Ib.* 329), repealed them "in all their parts," and expressly declared (article 2) that "all the titles issued during that period [from September, 1821, to the time of those edicts] by the superior authorities of the states or territories under the federal system, by virtue of their *lawful faculties*, * * * in conformity with the existing laws [*leyes vigentes*] for the grant or alienation, respectively, shall for all time be good and valid, as well as those of any other property lawfully acquired, and in no case can they be subjected to new revision or ratification on the part of the government."

The learned author was in error in supposing that this later "law-maker" meant to denounce all territorial grants except such as were made under the colonization law of 1824, for the only denouncement contained in the decree of the third of December, 1855, applied to alienations "without the

requisites referred to in the preceding article" [art. 2], and especially alienations within the littoral limit prescribed by article 4 of the colonization law, together with cases of forfeiture for breach of conditions, thus evidently intending to invoke the colonization law only when it had changed other "lawful faculties."

These shameless "decrees" of Santa Anna become grotesque and laughable when read in contrast with article 9 of his "Plan of Vera Cruz" of the sixth of December, 1822, by which he declared and guaranteed the continuance of the Spanish constitution and the existing laws. (4 "México," 87.)

For his unlawful transgression of vested rights he was afterwards denounced and muleted in damages (Treatise, *supra*, 331), and so were his ministers and governors for their share in the iniquity. *(Ib.)*

Not only was the Antonio Chaves title good in its inception, under the laws, usages and customs *rei sitæ*, but it became confirmed by the law of prescription:

It is a "just title," even as was the title of Monica Pino, his wife, derived from him by conveyance (as we hereby offer to show, by an instrument to which both were parties, dated the twelfth of February, 1835, and recorded in book "F," page 142, of records of Socorro county), because each took from a grantor claiming the right and power to grant, by instruments of title unequivocally purporting to grant an estate in fee (1 White, 345, 346).

It is a title in "good faith." This is expressly found by the Land Court (*Manuscript*, fol. 209), and it is expressly so declared by the political chief in his report to the provincial deputation (*Ib.*, fols. 15, 21), and it is otherwise so apparent in the conduct of the grantee, and afterwards of his wife and subsequent assigns.

"Good faith consists in the possessor of the thing believing that he is the owner thereof by having lawfully acquired it." (1 White, 346.)

It is a title supported by continued possession for upwards of seventy years, of which about twenty-four elapsed under the Mexican flag. (1 White, 346; 9 Pet., p. 760; 10 Pet., p. 662; 159 U. S., p. 464.)

The grantee and his wife were each competent to take and hold the land. (1 White, 346.) The claim and uninterrupted possession endured a sufficient length of time. The land, not only the parts expropriated from the towns of Socorro and Sevilleta, but all the rest, was subject to prescription.

Hon. Joseph M. White, author of the familiar compilation of Spanish and Mexican Land Laws, etc., when of counsel in the case of *Mitchel vs. United States*, 9 Pet. 711, made the successful argument. It appears as an appendix to the second volume of his published work. He there declared, in claiming that the title then under discussion was valid by prescription (2 White, 739; 9 Pet., *supra*):

> "The Spanish government was bound by the knowledge of and consent to the purchase; and, by the Spanish law of prescription, the purchasers acquired a valid title by an uninterrupted possession, in good faith, for upwards of ten years, which period is sufficient when the parties are present, and the king was always present by his officers."

In its decision this court, taking the same view of the law, declared the prescriptive period to be ten years. (9 Pet. 761, *supra*.)

There can be no doubt that under the Spanish civil law, which was the law of Mexico, the maxim, *Nullum tempus occurrit regi*, while it protected the inalienable political rights of the king, such as the

right of taxation, the right to confer offices and dignities, and, generally, the sovereign right to govern, did not extend to possessory claims affecting the crown lands, since in them his interest was simply proprietary. Such lands might be lost to the crown under an "immemorial" prescription, or one of forty years' possession without documentary evidence. (*Vide* 1 White, 95, 349; 2 White, 736, 737, 739.)

Private rights of property held against the crown under the law of prescription were frequently acknowledged in royal cedulas and orders, as in the cedula of 1754.

(Reynolds, pages 47, 48, 49, 52; 1 White, 95, 96, 349.)

But when prescription was claimed under "just title"—that is, documentary color of title, especially such as involved adjudications of title by the king's notaries and tribunals, it appears that ten years was the period of prescription. (2 White, page 739; 9 Pet. 761, *supra*.) The title acquired by Monica Pino, the grantee's wife, under the Mexican law, involved an adjudication. (2 White, 733, 738, 739; 12 Pet., p. 435.)

While, under the law of presumption and the law of prescription, our title became definitively confirmed long before the Mexican cession, the subsequent lapse of time under our flag and constitution has added to it additional solemnity and sanction; for, in considering the effect of time in strengthening private land claims accompanied with possession, this court has always taken into account the efflux of time under American occupation of ceded territory. Thus, in *United States vs. Chaves*, 159 U. S. 452, the grant adjudicated was made in 1835, so that the possession under Mexico continued only thirteen years, but the court said (*Ib.*, page 463):

* * * "But there is the weighty fact that for nearly sixty years the claimants and their ancestors have been in the undisturbed possession and enjoyment of this tract of land." * * * (Page 464) "the strong presumption growing out of an exclusive and uninterrupted possession and enjoyment of more than half a century," etc.

In *United States vs. Alviso*, 23 How. 318, the fourteen years' possession regarded by the court included eight years elapsed since the treaty. In *United States vs. DeHaro's Heirs*, 22 How., p. 298, the sixteen years' possession which influenced the decision included thirteen years so elapsed.

In *Innerarity vs. Heirs of Mims*, 1 Ala. 660, the court said (*Ib.*, p. 671):

> "The treaty of 1803, as well as that of 1819, by which the title of the United States was formally admitted by Spain to this territory, stipulated for the protection of private rights; and it would seem that full effect could not be given to these treaties, but by permitting the *prescription*, which had commenced while the country was under the dominion of Spain, to be completed afterwards."

"The doctrine of presumption is as fully recognized in the civil as it is in the common law. It is a principle which no enlightened tribunal, in the search of truth and in applying facts to human affairs, can disregard."

New Orleans vs. United States, 10 Pet., at page 721.

United States vs. Chaves, 159 U. S., page 464.

Fletcher vs. Fuller, 120 U. S. 534.

Therefore, the civil law, like our common law, would, in proper cases, sustain titles by the fiction of a presumed lawful origin, even though the proof of a technical prescription might be deficient.

So that it is immaterial whether New Mexico in making the grant exercised an inherent governmental power, originating in the royal cedulas or ordinances, or in secret instructions to her old governors, from king, viceroy, audiencia, comandante or inspector, or in the decrees of the cortes—all these legal factors, as interpreted by her, becoming part of her autonomic being after the revolution by virtue of custom and usage—or whether she acted as the instrumentality of the republic, under legislative and executive instructions, express or implied. In neither case is this court called on to pursue an investigation of the dark and mazy recesses of Spanish and Mexican policy and caprice, in the doubtful search for data to aid the formulation of a specific theory of the precise origin of the title. The legal presumption deducible from the established facts supplies the place of all theories. That presumption covers the whole title and every part of the tract of land to which it relates, and invokes in its support whatever quality or quantity of governmental power could "by any possibility" be necessary to confer such a title. It invokes whatever inherent power resided in New Mexico as a province or territory, and it invokes equally whatever inherent power resided in the republic. It is not limited by any consideration of the power which might have been vested in the Mexican executive, or in any other official depositary of special authority, but it comprehends the Mexican legislative and judicial powers as well. On the same principle, an act of Parliament has been presumed (Best, Evidence, § 393; 2 Wharton, Evidence, § 1348), it being unimportant whether

or not the archives or the printed volumes preserved any evidence of such an enactment; and there is nothing in the bloody, blurred and incoherent history of Mexico to exempt her political or legislative doings from an equivalent presumption. (*Fletcher vs. Fuller*, 120 U. S. 534; *United States vs. Chaves*, 159 U. S. 452.)

Venerable landed possessions, whether claimed and possessed by the aborigines, or by a civilized monarch, or by an humble peasant, become actual facts of legal cognizance, however mysterious their evolution from the unknown. In respect of many Spanish and Mexican titles, as of many titles to lands in other continental countries and in the British Isles, it is mere matter of speculation to theorize as to their birth. The German Empire would hardly inquire into the primary grounds of private possessions in Alsace and Lorraine. A nebular hyopthesis may do as well as any other. But whatever the theory suggested as to the beginning of so meritorious a claim and possession as ours, the final outcome is a title which, under the law of nations, the laws, usages and customs of Spain and Mexico, the stipulations of the treaty and the dictates of national honor, must be held complete and perfect.

In its adjudication, the court, in view of all the facts and circumstances, is in duty bound to invoke such a beneficial presumption *that what ought to have been was*, as upon the familiar doctrine applicable in such cases will supply the place of all missing links, if any, in our muniments; especially because the great lapse of time has made such a presumption just, equitable and imperative.

Conclusion.

If Antonio Chaves and his wife, still owning their grant, had lived until to-day and, weighed down with a hundred years, had come into this court with their title as we have proved it, and prayed the court to confirm them in their life-long possession of the granted tract, would the court have dismissed them, landless and penniless? The present claimant and his mortgage creditors come into court accredited with all the title, equity, and possession which the grantee and his wife would have had in the case supposed, and even with additional claims to political and judicial consideration; for, on the faith of the title and of its favorable mention by the secretary of the interior, the commissioner of the General Land Office, and the committees of the house of representatives (Ex. Doc. No. 149, 43rd congress, 1st session; Report No. 1501, 47th congress, 1st session; House Bill 5691; secretary's letter of fifteenth of May, 1882; commissioner's letter of ninth of May, 1882; favorable report of committee ordered to be printed the twentieth of June, 1882) as well as on the faith of the confirmation by congress of similar titles, they have made large expenditures, exceeding, with interest, the sum of one hundred thousand dollars, in the purchase and protection of the property. Nor are they to be prejudiced because the lands which they have acquired are now sufficiently valuable to excite the cupidity of the covetous, or the misconduct of the lawless, although in 1825 their value was only nominal.

As was said by Mr. Justice BALDWIN, in *Strother vs. Lucas*, 12 Pet., page 447, with reference to old St. Louis titles, "what would now be a splendid fortune, would not, fifty years ago, be worth the clerk's fee for writing the deed which conveyed it, and was, therefore, passed from hand to hand by

parol, with less formality than the sale of a beaver skin, which a bunch of wampum would buy. The simple settlers of St. Louis then little thought that the time would ever come when, under a stranger government, the sales of their poor possessions, made in the hall of the government, at the church door after high mass, entered on the public archives as enduring records of the most solemn transactions, would ever be questioned by strict rules of law or evidence."

The proud judicial spirit which was thus expressed was again manifested by the court in the case of *United States vs. Sutherland*, 19 How. 363, wherein it said:

> "In construing grants of land in California, made under the Spanish or Mexican authorities, we must take into view the state of the country and the policy of the government. The population of California before its transfer to the United States was very sparse, consisting chiefly of a few military posts and some inconsiderable villages. The millions of acres of land around them, with the exception of a mission or a *rancho* on some favored spot, were uninhabited and uncultivated. It was the interest and the policy of the king of Spain, and afterwards of the Mexican government, to make liberal grants of these lands to those who would engage to colonize or settle upon them. Where land is plenty and labor scarce, pasturage and raising of cattle promised the greatest reward with the least labor. Hence, persons who established *ranchos* required and readily received grants of large tracts of country as a range for pasturage for their numerous herds. Under such circumstances, land was not estimated by acres or arpents. A square league, or *sitio de ganado mayor*, appears to have been the only unit in estimating the superficies of land. * * *

To those who deal out land by the acre, such monuments as hills, mountains, etc., though fixed, would appear rather as vague and uncertain boundary calls. But, when land had no value, and the unit of measurement was a league, such monuments were considered to be sufficiently certain. Since this country has become a part of the United States, these extensive *rancho* grants, which then had little value, have now become very large and very valuable estates. They have been denounced as 'enormous monopolies, princedoms,' etc., and this court have been urged to deny to the grantees, what it is assumed the former governments have too liberally and lavishly granted. This rhetoric might have a just influence, when urged to those who have a right to give or refuse. But the United States have bound themselves by a treaty to acknowledge and protect all *bona fide* titles granted by the previous government; and this court have no discretion to enlarge or curtail such grants, to suit our own sense of property or defeat just claims, however extensive, by stringent technical rules of construction, to which they were not originally subjected."

Therefore, we pray the court, in reversing the decision of the divided court below, to pass a decree confirming the Antonio Chaves grant, as a complete and perfect title under the laws of Mexico and under the treaty of Guadalupe Hidalgo, with its boundaries as they appear on its provisional survey by the United States, and thereupon to remand the cause for further proceedings, in respect of survey and patent, conformable to the statute.

Respectfully submitted,

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